89-1610

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

IN THE MATTER OF THE
ESTATE OF OLIVE E. MORI,
Deceased,

EUGENE E. MORI,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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On the Petition
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QUESTIONS PRESENTED

1. Whether under New Jersey law the imposition by a trial judge of an excessive and unprecedented punitive damage award of $1.6 million against a fiduciary of an Estate where the Estate has suffered no actual damage and which is devoid of any structural proportionality is violative of Petitioner's right to due process under the Fourteenth Amendment to the United States Constitution?

2. Whether multiple punishments of Petitioner for his acts of perjury and contempt violate the requirement of fundamental fairness that is essential to due process?

3. Whether in the absence of a contempt proceeding, the assessment by a trial judge of "civil" punitive damages as a "fine, punishment or surcharge" for acts or omissions in the nature of contempt of court is violative of the Eighth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

4. Whether the imposition by a trial judge of a "civil" punitive damage award as a "penalty" or "sanction" for invoking the Fifth Amendment privileges is violative of the Fifth Amendment to the United States Constitution?

5. Whether "civil" punitive damages can ignore and supplant the criminal law (with its restrictions on penalties) and thereby impose greater punishment than the criminal law allows under the aegis of "punitive damages"?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Eugene E. Mori and the Respondents, Joan M. McCrane, A. Arthur Miller, Julius B. Poppinga, Esq., Bernard W. Capaldi, Janice Vondra and the children of Joan McCrane.

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IN THE
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THE MATTER OF THE
ESTATE OF OLIVE E. MORI,
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Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The Petitioner, Eugene E. Mori, respectfully prays that a Writ of Certiorari issue to review the Opinions and Judgment of the Superior Court of New Jersey, Burlington County, Law Division, Probate Part, entered in the above-captioned proceedings on November 21, 1986, April 24, 1987, and May 18, 1987, and as affirmed by the Superior Court of New Jersey, Appellate Division in an unpublished Opinion dated October 3, 1989. On January 12, 1990, the Supreme Court of New Jersey entered an order denying Petitioner's Appeal as of Right and Petition for Certification to review in their entirety the Opinions and Judgment entered below.

OPINIONS BELOW

The Opinions and Judgment of the Superior Court of New Jersey, Burlington County, Law Division, Probate Part, dated November 21, 1986, April 24, 1987, and May 18, 1987 have not been reported. They are reprinted in the Appendix hereto at A1, B1 and C1, respectively.

The Opinion of the Superior Court of New Jersey, Appellate Division dated October 3, 1989 has not been reported. It is reprinted in the Appendix hereto at D1.

The January 12, 1990, order of the Supreme Court of New Jersey denying Petitioner's Appeal as of Right and Petition for Certification is reprinted in the Appendix hereto at E1.

JURISDICTION

The Opinions and Judgment of the Superior Court of New Jersey, Burlington County, Law Division, Probate Part were entered on November 21, 1986, April 24, 1987, and May 18, 1987. The Superior Court of New Jersey, Appellate Division affirmed the Opinions and Judgment below in an unpublished Opinion dated October 3, 1989. On January 12, 1990, the Supreme Court of New Jersey denied Petitioner's Appeal as of Right and Petition for Certification to that Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment, Section 1 of the United States Constitution provides in relevant part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Eighth Amendment to the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

4. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. BACKGROUND

This case involves a secret Swiss asset created in 1958 of the now deceased father, Eugene Mori, and the involvement in that asset by his son, Petitioner Eugene E. Mori. The father's intended succession of the asset, according to Petitioner, was to be from father to mother to self. In sequence, Eugene Mori, Sr. became incompetent, and then Olive Mori and Petitioner were appointed guardians. Olive died in July 1975, and thereafter Petitioner became co-executor of her estate. Then, Eugene Sr. died.

Trapped as Petitioner was by his covert mission, his self-interest, and his fulfilling of the parental design by the transfer of the elicit Swiss bank account, Petitioner perjured himself

in February 1976. Under the pressure of a criminal tax investigation and upon the advice of counsel, Petitioner invoked his Fifth Amendment rights in February 1977. In August 1977, Petitioner resigned his co-executor's role, his guardian's office having expired with his father's death. By August 1977, the existence and history of the Swiss asset was known and the asset was in the exclusive control of Bernard Capaldi, the sole Executor of the Estate of Olive Mori.

B. THE LITIGATION BELOW

The instant law suit to impose a "surcharge" upon Petitioner for his conduct regarding the Swiss asset was originally filed in 1979 in the Superior Court of New Jersey, Burlington County, Chancery Division. On June 26, 1981, the matter was dismissed for failure to prosecute. This action was revived in the Superior Court of New Jersey, Burlington County, Law Division, Probate Part in 1982, but punitive damages were not sought until 1985. By the time this compounded litigation ended in the courts below, Petitioner had been made to suffer the following consequences:

1. As guardian he was stripped of his $70,000 commission;

2. As executor of the Estate of Olive Mori, Petitioner was surcharged $993,738 consisting of $749,168 in "compensatory damages and prejudgment interest" on that award of $244,570. The vast majority of the "compensatory damages" were in actuality the attorneys' fees and attorneys' costs;

3. As litigant, Petitioner's proprietary claim to his parents' $1.6 million Swiss asset was suppressed without a hearing on the merits as a "sanction" for his failure to come forward with details of other Swiss assets "belonging" to the Estate—which phantom assets never existed—and for failure to release details of yet other personal unrelated Swiss accounts created by Petitioner with his own funds;

4. As Eugene Mori, individually, a Judgment for punitive damages of $1.6 million was entered against

him in favor of his mother's Estate while disqualifying him from sharing in that "estate asset" as a beneficiary of that Estate;

5. As Eugene Mori, son and beneficiary, the distributive shares of both his parents' Estates were attached to answer for this array of Judgments against Petitioner—in effect a penalty of a *de facto* forfeiture—of his entire inheritance.

C. PRESENTATION OF FEDERAL QUESTIONS BELOW

During much of the approximately seven week trial in this matter, Petitioner, Eugene Mori, appeared *pro se.* Even with the benefit of experienced counsel at the trial level, however, no one could have predicted that the trial court would ignore constitutional strictures and impose a Judgment in excess of $3 million against Petitioner.

This case is unique because unlike jury verdicts imposing punitive damage awards which require counsel and the court to speculate as to whether the bases of the award are constitutionally proscribed, the trial court issued a fifty-seven (57) page opinion wherein the constitutional arguments he considered were addressed and articulated. Thus, the errors of constitutional dimension are manifest.

On appeal, before both the Superior Court of New Jersey, Appellate Division and Supreme Court of New Jersey, Petitioner raised, briefed and vigorously argued the federal constitutional questions presented in this Petition. *See* Appendix F1 and G1. Although the Superior Court of New Jersey, Appellate Division recognized one of the constitutional arguments raised under the Excessive Fines Clause, the Appellate Division ignored the constitutional challenges raised under the Due Process Clause of the Fourteenth Amendment. *See* Appendix D9 to D10.

The Fifth Amendment issues were evaluated by the trial court in its imposition of counsel fees and $1.6 million in

punitive damages. Petitioner's invoking his Fifth Amendment rights, codified at N.J.S.A. 2A:84A-19,[1] and what penalty was "too costly" for so doing were also analyzed. *See* Appendix A35 to A40. The "surcharge" and punitive damages at issue are clearly sanctions erroneously imposed by the trial court for that conduct in contravention of the controlling precedents of this Court. The Appellate Division affirmance, however, *see* Appendix D7 to D8, ignored the constitutional proscription against making Petitioner's Fifth Amendment privilege "costly." *Spevack v. Klein*, 385 U.S. 511, 515 (1967).

As manifested by the multiple and excessive awards in this case, trial judges and reviewing appellate courts have free and untrammeled discretion regarding monetary punishment. Indeed, it would appear that New Jersey courts are free to ignore the proscribed procedures and limitations on penalties under the criminal law and to opt for the civil remedy of "punitive damages" to impose greater punishments.

REASONS FOR GRANTING THE WRIT

The size and frequency of punitive damage awards have increased dramatically in recent years. The award of punitive damages has become a seemingly typical component of contemporary litigation.

As is evident from the record in this case, in the absence of guiding principles or statutory guidelines, a trial judge invoked his unrestricted discretion and authority to impose excessive punitive awards which bore no rational relationship to the actual harm suffered, as *punishment* for the conduct of

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[1] N.J.S.A. 2A:84A-19 provides in pertinent part:

"Subject to [N.J.S.A. 2A:84A-29—Waiver] every natural person has a right to refuse to disclose in an action . . . or to other official any matter *that will incriminate him or expose him to a penalty or forfeiture of his estate. . . .* " (emphasis added).

Eugene Mori as a litigant. Such untrammeled discretion is foreign to the concept of due process embedded in the Fourteenth Amendment.

This Court has not definitively determined whether standardless discretion to determine the severity of punishment in civil punitive damage cases violates the requirement of "fundamental fairness" that is essential to due process. *Lassiter v. Department of Social Services,* 452 U.S. 18, 25 (1981). This Court, however, has barred punitive damages in several categories of cases. *See Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1979), *cert. denied,* 459 U.S. 1226 (1983) (defamation); *Electrical Workers v. Foust,* 442 U.S. 42, 53 (1979) (union fair representation cases); *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985) (ERISA self-funded employee benefit plans). This Court has also commented on the significant constitutional issues implicated by excessive and disproportionate punitive damage awards, *see Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813 (1986); *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71 (1988); and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. , 109 S.Ct. 2909 (1989), but declined to address those questions on the records presented.

On April 2, 1990, this Court granted a Petition for a Writ of Certiorari in *Pacific Mutual Life Insurance Co. v. Haslip,* No. 89-1279, to determine, among other things, whether excessive and disproportionate *jury* awards of punitive damages are violative of due process.

This case presents the Court with the opportunity to examine in a companion case, the constitutional limitations on judges to impose duplicative, excessive, disproportionate punitive awards as "fines" and "punishments" upon litigants for their conduct and as sanctions for their perceived "crimes," and to examine the present state of punitive damages doctrine to determine whether due process standards

are met, where, as here, the *trial judge* has untrammeled discretion regarding whether and how much to punish.

This case provides an excellent opportunity for the Court to clarify and to articulate standards to serve as a polestar for *judges* sitting as fact-finders in cases involving the assessment of punitive damages. Unlike the due process review of the jury award of punitive damages at issue in *Pacific Mutual* which could involve speculation regarding that jury's deliberative processes, the Court in this case is presented with a tangible, albeit incorrectly decided, decision of the trial court which will serve as a matrix to review the unprecedented punitive damage award in this litigation. Be it in the context of a trial judge or jury award, this unsettled and potentially capricious area of the law calls out for the guidance of this Court.

I. IN THE ABSENCE OF A STATUTORY LIMIT THE SUBJECTION OF PETITIONER TO DUPLICATIVE AND EXCESSIVE MONETARY PUNISHMENT IS FUNDAMENTALLY OFFENSIVE TO CONCEPTS OF FUNDAMENTAL FAIRNESS EMBODIED IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Command of Due Process

While not labeled "criminal," exemplary damages are completely analogous to criminal punishment. This Court has recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder,* 442 U.S. 114, 123 (1979). Unlike the criminal law, however, which has incorporated procedural safeguards in the area of sentencing, civil fact-finders and juries are often left to their discretion to assess punitive damages in a subjective and standardless vacuum.

In *Bankers Life & Casualty Co.,* Justice O'Connor in a concurring opinion joined by Justice Scalia, emphasized the lack of objective standards in this area:

> Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially substantial.'
>
> . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process.

486 U.S. at 87-88 (O'Connor, J. concurring) *(quoting Electrical Workers v. Foust,* 442 U.S. 42, 50 (1979)).

Similarly, in *Browning-Ferris,* Justice Brennan, in a concurring opinion joined by Justice Marshall, voiced concerns regarding the constitutional ramifications of unrestricted punitive damage awards, especially where, as here, the trial court does not have the benefit of any objective criteria:

> [P]unitive damages are imposed by juries guided by little more than an admonition to do what they think is best. Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Daniels v. Williams,* 474 U.S. 327, 331, 88 L.Ed 2d 662, 106 S.Ct. 662 (1986), quoting *Dent v. West Virginia,* 129 U.S. 114, 123, 32 L.Ed 623, 9 S.Ct. 231 (1889), I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

Browning-Ferris, 109 S.Ct. at 2923 (Brennan, J. concurring).

At present, under New Jersey law the decision of whether or not to award punitive damages and the amount of such damages is committed to the moral discretion of each jury, or in this case, a single trial judge. Imposition of such punishment is therefore necessarily subjective, arbitrary and unpredictable. As the court noted in *Devlin v. Kearny Mesa*

AMC/Jeep/Renault, Inc. 155 Cal.App.3d 381, 202 Cal.Rptr. 204 (Cal.Ct.App. 1984):

> The process through which a fact finder finds punitive damages is somewhat contradictory. On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the fact finder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, *an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns.* The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to 'how much' is necessary to punish and deter.

Id. at 388 (emphasis added). Such arbitrary and discriminatory applications of punitive damage "guidelines" are barred by the requirement of fundamental fairness that is the cornerstone of due process.

Despite the best of intentions, trial judges, like juries, must not be permitted to follow their own personal predilections or to rely on subjective criteria when assessing civil punitive damages. *See Kolender v. Lawson,* 461 U.S. 352, 356 (1983). Indeed, a single trial judge is arguably worse than a jury because the decision to award punitive damages is reposed in the moral discretion of *one* person, whose decision, without standards, is necessarily subjective and unpredictable. As noted in *Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971), such a decision may well turn "upon whether or not a [trial judge] is annoyed." Where constitutional rights are at stake, individual judges must not be allowed to pursue their personal predilections at the expense of sacrificing constitutional rights.

Notwithstanding this obligation, the trial judge in this case assessed an excessive and admittedly unprecedented punitive damage award of $1.6 million against a fiduciary of an Estate *which had suffered no actual damage.* In his own words:

> *the court hereby fixes the sum of $1,610,000 as punitive damages, the value of the Swiss assets on the date of Olive Mori's death. The selection of that figure is neither arbitrary nor meant to be poetic or ironic.*

Appendix A40 (emphasis added). Despite the trial judge's disclaimer, the punitive damage award in this case was one man's attempt at poetic justice which disregarded appropriate criminal procedures and safeguards and utilized civil punitive damages as a constitutionally proscribed "quasi-criminal" penalty devoid of structural proportionality to punish the litigant. The amount chosen bore no relationship to any *rational, objective standard*, but rather was pure punishment based on "eye for an eye" justice. Indeed, one must question whether if the value of the Swiss asset had been $10, that figure would have been "selected" as the punitive damage award. Conversely, had the Swiss asset been worth $100 million, would Petitioner have been required to be punished in that amount.

It is well-settled that the content of due process is not limited to the specific provisions of the Bill of Rights. *See In re Winship,* 397 U.S. 358 (1970). Indeed, due process protections apply to any legal proceeding or regime by which any person may be deprived of "life, liberty, or *property." Shaffer v. Heitner,* 433 U.S. 186 (1977) (emphasis added).

Due process requires that *legal procedures* be consistent with "fundamental fairness," *Lassiter v. Department of Social Services,* 452 U.S. at 25; that they be in accordance with "ordinary notions of fair play and the settled rules of law," *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926); and that they not offend the "community's sense of fair play and decency." *International Shoe Co. v. Washington,* 326 U.S. 310, 320 (1945).

In *Lassiter*, 452 U.S. 18, this Court summarized the command of due process and set forth the analysis to be followed in determining its application in a particular context:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Id. at 24-25 (citation omitted).

The decisions below assessing in excess of three million dollars in monetary punishment against Petitioner in the judicial context of a "surcharge" proceeding are in direct contravention of the requirement of "fundamental fairness" that is essential if the protections afforded by the Due Process Clause are to have any meaning. Indeed, the evidence of perjury, contempt and invoking of the Fifth Amendment considered by the court and the resulting punishment meted out by the trial court for such conduct, which procedure and punishment were condoned by the Appellate Division and resulted in the unprecedented *de facto forfeiture* of Petitioner's inheritance under both his mother and father's wills, was *procedurally deficient* and a *fundamentally unfair, unwarranted and unconstitutional* imposition of excessive and unlimited monetary punishment upon Petitioner in contravention of his due process rights under the Fourteenth Amendment.

B. Due Process Protections Preclude Grossly Excessive and Disproportionate Damage Awards

By August, 1977, the existence and history of the Swiss asset at issue in this case was known; more importantly, Petitioner had by that date repatriated the Swiss asset and placed it in the exclusive control of Bernard Capaldi, the sole Executor of the Estate of Olive Mori. Notwithstanding the fact the Estate had suffered no actual damage, the trial judge imposed on Petitioner the sum of $1,610,000.00—the value of the Swiss assets on the date of Olive Mori's death—as punitive damages. The selection of that precise sum was manifestly arbitrary and capricious. Indeed, the court failed to follow even the most "skeletal" guidelines and instead awarded a "windfall" to the Estate. In sum, the award was a subjective visceral reaction to Petitioner's conduct as a litigant and was excessive and disproportionate under due process standards.

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. , 109 S.Ct. 2909, 2923 (1989), Justice Brennan, in his concurrence, suggested that due process forbids excessive damages in civil cases:

> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are "grossly excessive," *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86,111 (1909), or "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable," *St. Louis, I.M. & S.R. Southwestern Telegraph & Telephone Co., v. Danaher*, 238 U.S. 482, 491 (1915); *Missouri Pacific Railway Co., v. Humes*, 115 U.S. 512, 522-23 (1885). I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.

The punitive award in this case was made not only without the benefit of a statutory scheme, but it was also

determined without the benefit of the deliberative jury process. Given the penal nature of exemplary damages, it is clear that due process must serve to contain excessive and grossly disproportionate awards. If, as the trial judge and Appellate Division found, punitive damages are designed to punish the wrongdoer, *see Fisher v. Johns-Manville,* 103 N.J. 643 (1986), then certainly the constitutional protections afforded by the Fifth, Sixth and Eighth Amendments should apply under the Due Process Clause of the Fourteenth Amendment. *See United States v. Halper,* 490 U.S. , 109 S.Ct. 1892 (1989); *Trop v. Dulles,* 356 U.S. 86 (1958); *United States Ex. Rel. Marcus v. Hess,* 317 U.S. 539 (1943). Where, as here, the amount of the sanction is *eighty times* the amount which the court below determined to be the actual damages to the Estate, the punishment meted out is grossly out of proportion to the severity of the offense and is therefore constitutionally flawed. *Gregg v. Georgia,* 428 U.S. 153 (1976).

C. Multiple Unrestricted Punishments for a Single Course of Conduct Are Constitutionally Proscribed

Due process also requires that a limit be placed on the extent to which a defendant may be subjected to punishment for a *single* course of conduct especially where, as here, the Estate has suffered little or no actual damage. Irrespective of the label given to the "sanction," the "surcharge" and the punitive damage award in this case cannot be tolerated under the requirements of due process because they amount to nothing more than multiple, unrestricted punishments and in this case to a total deprivation of Petitioner's shares in the Estates of both his parents. One must ask, does the punishment fit the crime? Or, how many times must Petitioner be punished for his 1976 conduct? *See Juzwin v. Armtorg Trading Corp.,* 705 F.Supp 1053, *reconsidered on other grounds,* 718 F.Supp 1233 (D.N.J. 1989).

II. THE ASSESSMENT OF A $1.6 MILLION PUNITIVE DAMAGE AWARD AS A "SURCHARGE," "PUNISHMENT" OR "FINE" FOR ACTS OR OMISSIONS IN THE NATURE OF CONTEMPT OF COURT VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT AND THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It appears that the Judgment of the trial court was motivated by outrage and *suspicion* that "other" Swiss assets existed. The record does not contain a scintilla of evidence to support the existence of other Swiss assets. The object of the quixotic quest of Respondent, Joan McCrane and her counsel for such phantom "assets" was never substantiated; but they were able to reverse the consequences of their phyrric loss by convincing the court below to "reallocate the burden" of their litigation against Petitioner by assessing their counsel fees against Petitioner under the *"guise* of a surcharge" and then to *compound* the "surcharge" with punitive damages of $1,610,000.00.

A fair reading of the Appellate Division's Opinion is that the court concluded that given Petitioner's conduct in 1976 *no further analysis* was necessary. Clearly, no constitutional analysis was evident from the appellate opinion. Indeed, while that court cited the appropriate standards, *i.e.,* "while the extent of the actual harm inflicted is a factor the trial court should consider while making a punitive damage award and a punitive award should bear a reasonable relation to the injury inflicted and cause of the injury," *see* Appendix D8 to D9, it is uncontestable that these standards were shibboleths. The total sum of the actual damages to the Estate in this case was approximately $20,000. Despite the fact the punitive damages assessed were *eighty* times greater than the actual damages, proportionality and fairness arguments were deemed "meritless," because the court felt that such arguments have no viability under New Jersey law as articulated

in *Nappe v. Anschelewitz, Barr, Ansel & Bonello,* 97 N.J. 37 (1984) (upholding two dollar nominal damage award and a $50,000 punitive damage award).

As is evident from the record and opinions below, punitive damages were employed "*to punish [an] unpopular defendant,*" *Electrical Workers v. Foust,* 442 U.S. at 50-51 (emphasis added), and were "assessed in [a] wholly unpredictable amount[ ] bearing no necessary relation to the actual harm caused." *Gertz v. Welch,* 418 U.S. 323, 350 (1974). Although not labeled "criminal," these punitive awards are completely analogous to criminal punishment because in this case exemplary damages serve precisely the same purposes as criminal sanctions. Petitioner's "quasi-criminal fine" was due to his prior perjury—a criminal offense for which he was *never* indicted—to his lack of popularity, especially as an irritating, often *pro se* litigant and to unsupported speculation in the absence of proof of other Swiss assets.

Although this Court has recently held that the Excessive Fines Clause of the Eighth Amendment to the United States Constitution is inapplicable to punitive damage awards between private parties, *Browning-Ferris Industries, Inc.,* 109 S. Ct. 2909, the award in this case as a surcharge or fine for acts or omissions in the nature of contempt of court is factually distinguishable and amounts to a quasi-criminal penalty imposed on Petitioner for his conduct as a litigant. Where, as here, the sanction imposed is intended as punishment, constitutional safeguards under the Fifth, Sixth and Eighth Amendments must apply. *See Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963). Notwithstanding the quasi-criminal nature of the sanction imposed by the trial judge for Petitioner's conduct as a litigant, including contempt, Petitioner was denied the procedural safeguards of the criminal law. Ignoring the constitutional mandate, the trial judge in this case served as prosecutor, judge, jury and sentencer

and imposed significantly greater punishment than permitted under the criminal law.

The awards in the courts below constitute a "fine" and encompass a forfeiture which is subject to constitutional limitations. The unprecedented infliction of a "civil" punitive damage surcharge for Petitioner's conduct as a litigant in this case can only be explained as an unwarranted retributive sanction which requires review by this Court.

III. THE IMPOSITION OF A PUNITIVE DAMAGE AWARD AS A PENALTY FOR PERJURY OR AS A SANCTION FOR INVOKING THE FIFTH AMENDMENT PRIVILEGE IS VIOLATIVE OF THE UNITED STATES CONSTITUTION.

It was undisputed for eight years prior to the trial that Petitioner perjured himself in 1976 regarding the existence of the Swiss bank account and had in the face of an Internal Revenue Service criminal investigation invoked his constitutional right against self-incrimination. That conduct cannot be punished without procedural safeguards, and cannot justify the imposition of punitive damages in a civil case especially where the perjured testimony was promptly discovered and its effects were *limited* and almost *de minimus* in terms of injury to the Estate. The punitive damages imposed in this case exceed any conceivable criminal sanction for perjury and were assessed without procedural safeguards.

In its imposition of $1.6 million in punitive damages, the trial court placed great weight upon Petitioner's invoking his Fifth Amendment rights and what penalty was "too costly" for so doing. *See* Appendix A35 to A40. The "surcharge" and punitive damages at issue are clearly punishment imposed by the trial court for that conduct. The Appellate Division affirmance (with a disingenuous disclaimer) ignored the constitutional proscription against making Petitioner's Fifth Amendment privilege "costly." *Spevack v. Klein*, 385

U.S. 511, 515 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

The assertion upon the advice of counsel of the Fifth Amendment right against self-incrimination cannot constitutionally justify the imposition of a *punitive* surcharge grossly in excess of any "injury" suffered by another by virtue of the privilege being asserted. To disinherit Petitioner in contravention of the express intent of the testators and the protection afforded by the Fifth Amendment because of the invocation of his constitutional right can never be justified.

CONCLUSION

The present state of punitive damages law is, without question, lacking in the "fundamental fairness" that is the cornerstone of the constitutional guarantee of due process. Unfortunately, this case is a prime example of reliance by a trial judge upon subjective and vague criteria to assess punitive damages in a standardless vacuum.

Like the criminal law, punitive damages are designed to punish and to deter; unlike the criminal law, however, the law of "civil" punitive damages is devoid of the constitutional and procedural safeguards which serve to limit the imposition of capricious and excessive punishments which are devoid of structural proportionality.

This case presents the Court with a unique opportunity to examine in a companion case to *Pacific Mutual Life Insurance Co. v. Haslip*, No. 89-1279, whether due process standards are met, where the *trial judge* alone, as opposed to the jury, has untrammeled discretion in a civil case regarding whether and how much to punish.

The present state of punitive damages law is in need of this Court's guidance to establish standards to serve as a lodestar for *judges* sitting as fact-finders in matters involving the assessment of punitive damages. For all the foregoing reasons, it is respectfully submitted that Eugene Mori's Petition for Certiorari should be granted.

Dated: April 12, 1990

Respectfully Submitted,

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APPENDIX A

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE OF OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BURLINGTON COUNTY
PROBATE PART
DOCKET NO. 75-1029

IN THE MATTER OF THE ESTATE
OF
OLIVE MORI, DECEASED.

OPINION

Decided: November 21, 1986

MESSRS COOPER, PERSKIE, APRIL, NIEDELMAN, WAGENHEIM & WEISS, Attorneys for Bernard W. Capaldi, Executor of the Estate of Olive Mori, Deceased (James L. Cooper, Esq., appearing)

MESSRS MCCARTER & ENGLISH, Attorneys for Joan M. McCrane, individually and Joan M. McCrane and A. Arthur Miller, as Trustees, and Julius B. Poppinga, as Trustee (Julius B. Poppinga, Esq., appearing)

MESSRS PARKER, MCCAY & CRISCUOLO, Attorneys for Bernard W. Capaldi, as defendant on the counterclaim (Marc M. Baldwin, Esq., appearing)

SEYMOUR WASSERSTRUM, ESQUIRE Attorney for Eugene E. Mori

WELLS, III, J.S.C.

This is a consolidated probate action drawing together, for one trial the several issues involving Swiss assets which had emerged in, but which were left undecided by, three closely related cases: The Matter of Eugene Mori, an Incompetent, (C-2560-73); The Estate of Eugene Mori, deceased (75-1298); and The Estate of Olive Mori, deceased (75-1029). Mrs. Olive Mori, who died testate on July 16, 1975, was the wife of Eugene Mori who died testate on October 8, 1975, and it is under her estate proceedings that the matter is heard and decided.

The principal thrust of the action is to surcharge Eugene E. Mori and to recover compensatory and punitive damages including forfeiture of his interest in both estates. Mr. Mori (hereinafter "Eugene") is one of the three children of the decedents, a beneficiary of both, and at various times a fiduciary both by Court appointment and testamentary designation. The central grounds for such recovery is alleged fiduciary misconduct marked by a pattern of self-dealing respecting the Swiss assets resulting in substantial expense to both estates and beneficiaries. Eugene seeks approval of his accounts as co-guardian of his father's incompetency estate and as co-executor of his mother's estate as they relate to the Swiss assets and for judgment vacating certain orders prohibiting distribution to him of his interest in both decedents' estates.

The facts are complex and give rise to several issues of first impression in this state.

FACTS

The trial dealt extensively with the "known Swiss Assets."[1] They were monies accumulated by the senior Eugene Mori beginning in 1958 by his physical transportation of cash in a briefcase one or two times each year until 1972 or 1973. He deposited the money in the Swiss Credit Bank in Zurich, Switzerland in a numbered account entitled "Manofwar 88095." No one else contributed to the fund. The funds were invested in Swiss and United States currency and a portfolio of securities of international companies which Mori would review from time to time with bank officers. In the normal course, these investments produced interest, dividends and capital gains.

The parties dispute whether the assets were a "secret." I conclude they were confidential but not secret; or, a family secret, at most, perhaps, but not a secret within the family. Obviously, Eugene knew of them. He accompanied his father on one or more trips to Switzerland to deposit money in the Swiss Credit Bank, and most of the time between 1958 and 1973 held a power of attorney on the account. Clearly also, Olive Mori knew of them. In addition, Joseph and Joan McCrane, Mori's son-in-law and daughter knew. See Mc59, Tab 17; ExC to C4, C21. On at least one occasion Mr. McCrane helped Mori pack the briefcase with cash and was able to describe its size and shape in detail. His testimony also impels the court to find that the money came, at least in part, from checks drawn against Mori's business, in which Mr. McCrane was active, The Garden State Racing Association, the owner of a thoroughbred race track located in Cherry Hill, New Jersey, known as the "Garden State Track" and operated from the 1940s by Mori. Mrs. McCrane testified she also accompanied her father on one trip to Switzerland on which he transported cash for deposit, and, at family gatherings, heard plans for the Swiss money as a retirement fund discussed. Finally, as will be seen later, *infra* p. 4, the

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[1] A term of art. It was defined in an "Estate Settlement Agreement" signed in December 1978, C45, paragraph D.

only documentary evidence of these funds in the United States was located within the walls of the Mori home itself.

What was kept secret was the fact that in August 1974, after Mr. Mori had been declared incompetent in March, Eugene and his mother, the court appointed co-guardians, went to the Swiss Credit Bank and opened another numbered account there in her name under the title of "E. Glorida, G22" (also numbered 291300) into which the assets of the Manofwar account were transferred. C20. In so doing Mrs. Mori acted under a power of attorney given her by Mr. Mori which survived his incapacity. C18. At the same time, she executed in her son's favor a similar power. C19. The assets remained the same or substantially the same before and after this transaction. See paragraph 8, Gentile Affidavit, C14. Neither Joan McCrane, Janice Vondra (the Mori daughters) nor anyone else including the Court that appointed them was advised of this transfer.

About eleven months later, while she was yet co-guardian of her bed-ridden husband, Mrs. Mori herself died as the result of a tragic accident. Within a month of her death Eugene appeared at the Swiss Credit Bank and under the power (which survived Mrs. Mori's death, C19) given him a year before again transferred the assets to an account in his name but entitled "Maraflora Foundation" in the Union Bank of Switzerland at Lausanne, and one over which he exercised exclusive control. Once again no one was told of this transfer even though by then Eugene had also qualified as co-executor with Mr. Bernard W. Capaldi of his mother's will.

Shortly after the death of her mother, Mrs. McCrane, with permission of the executors, went to the Mori home in Moorestown, to straighten up. While so doing she discovered numerous bits and scraps of paper bearing handwritten notes indicative of an account or accounts in Switzerland. C1a *et seq.* When she confronted her brother with questions about Swiss accounts he stated: "Its all been cleared up." But see Mc39, Tab 18. The papers she found were sent to her

attorney, who in turn forwarded them to the Administrator[2] of Mr. Mori's Estate. C2. In late 1975 and early 1976 depositions were taken of Joan, see Exhibit "C" to Trial Exhibit, C4, and Eugene by counsel to the Administrator. Significant portions of Eugene's deposition were admitted as Mc39. Eugene now admits the deposition was a pack of lies. C92, Tab D, Mc46. While admitting he and his mother visited Zurich in August 1974, he denied dealings with bankers. Mc39, Tab 4, p.38, line 19 to p. 39, line 5. He denied any dealings with the Swiss Credit Bank on his or his parents' part, *Id.* Tab 5&6, or any knowledge of the name "Manofwar" or the number 88095. *Id,* Tab 14. He denied any knowledge of the name "E. Glorida." *Id.* Tab 15. As a result, the investigation of the papers discovered by Joan was stymied, Mc5, and Mr. Capaldi, without knowledge of these assets, paid Federal and State taxes without including them in the filed returns. C94, 95.

However, new evidence, quickly surfaced. On Friday, April 30, 1976 the beneficiaries met at the Mori home to make an in-kind distribution of personal property. Exhibit E to Trial Exhibit C4. In a box Mrs. McCrane discovered a folder labeled "Monsieur A. Jutz" containing unmistakeable evidence of an account in the Swiss Credit Bank. C3B. Once again it was passed on to her attorney who sent it to the Administrator. C3A.

At about the same time, early 1976, Eugene began what was over the next ten years to become an intransigent refusal to sign any releases or waivers which would permit the Swiss banks to disclose information to either the Administrator or to Capaldi, C4, C14 and exhibits thereto, C23-C27 and C31, and both ran squarely into the practice of Swiss banks, buttressed by Swiss law, to refuse legitimate requests for information regarding the assets. C4. He also engaged a

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[2] The Administrator Pendente Lite appointed under the will of Eugene Mori was The Bank of New Jersey. It was represented throughout by William Baumgartner, Esquire, of the firm of Zink, Brown, Baumgartner & Cutts. Until February 1979, when, by agreement, the assets were placed in the Olive Mori estate, the two estates worked in a parallel and entirely cooperative effort to locate and identify them.

Swiss attorney to block access to the bank information. C5a, C6. In June 1976 the Administrator asked leave of court to pursue "further inquiry into any account at Credit Suisse . . . existing or closed during 1973 or later by the engagement of Swiss counsel, payment of . . . retainer and thereafter . . . fees . . ." C4.

At this point attention began to focus on Eugene as the source of the trouble. See Affidavit of Vincent J. Gentile, attached to C6. On February 7, 1977 Eugene was questioned again this time in open court. On this occasion, one year after the perjured deposition, he began taking the Fifth Amendment, Mc40, Tab 2, and that same day was ordered from the bench, *inter alia* to "cease and desist from all interference with . . . the inquiry of the [Administrator]" into the Swiss account and was directed individually and in both his fiduciary capacities to "consent to the disclosure . . . of the requested information and the delivery of the requested documents . . ." C7.

That order was ignored and on February 10, 1977 Judge Wood, on Order to Show Cause, demanded to know why Eugene had failed to comply. C8. An interlocutory appeal was denied, C9, and on April 7, 1977 contempt proceedings commenced. C10. Ultimately May 16, 1977 was fixed for discovery of Eugene's "knowledge of the existence and whereabouts or non-existence of said assets and accounts." C11.

On Sunday afternoon, May 15, 1977, 22 months after his mother's death, Eugene met privately with Mr. Capaldi at his home and confirmed for the first time the existence of the Swiss assets. He delivered a letter to his Swiss attorney, Dr. Faesch, from the Swiss Credit Bank. C29. The letter confirmed that Olive Mori had certain accounts in the Swiss Credit Bank on the date of her death and promised statements. Capaldi immediately notified the taxing authorities. C30.

The discovery proceedings were continued to June 27, 1977 and on that date Eugene once again refused to answer a number of questions on Fifth Amendment grounds. Mc41.

By that time, however, the parties knew that Eugene had engaged Dr. Faesch to institute an action in Switzerland to determine his claim to the Swiss assets. Faesch was the attorney who had been instrumental in blocking efforts by the Administrator to have the Swiss Credit Bank release information to it. Mc2, Tab B, p. 51, line 17 to p. 52, line 14; Mc2, Tab D. By way of justification for his lawsuit Eugene took the position he did not know who "owned" the assets while at the same time preserving his own claim to them. He testified:

> Q. Mr. Mori, is there some question in your mind as to who may be the owner of this account that possibly exists in Switzerland?
>
> A. That's the whole purpose of the lawsuit.
>
> Q. I see. So the answer is yes, there is a question in your mind?
>
> A. Yes. Yes.
>
> Q. And the question that you have is as to ownership between or among what persons?
>
> A. All the family.
>
> Q. What do you mean by all the family?
>
> A. Myself, my two sisters.
>
> Q. Are you suggesting—
>
> A. The estate, the estate of my father.
>
> Q. I'm sorry?
>
> A. Myself, my two sisters, the estate of my father.
>
> Q. How about the estate of your mother?
>
> A. Yes.
>
> Q. Well, are you unclear as to whether the account was in your—should be in your father's estate or your mother's estate?
>
> A. The possible accounts that I refer to?

Q. Yes.

A. Yes.

MR. POPPINGA: I have no—no further questions.

THE WITNESS: Or my father's estate or my mother's estate or the estate of any of the children.
(Mc2, Tab B, p.80, line 8, to p.81, line 2 and p.81, line 22 to p.82, line 7)

On the basis of this performance Joan McCrane asked that Eugene be removed as co-executor, Mc2, C32, and the Administrator pressed the contempt proceedings by way of Order to Show Cause which contained a restraint against Eugene "from prosecution . . . of the aforesaid litigation in Switzerland . . ." C12, page 6, C34. Eugene resigned as co-executor of Olive Mori's estate, which was approved by order of August 2, 1977 "subject, however, to his duty to account as co-executor." C33. Thereafter, as sole executor Capaldi went to Switzerland for the purpose of getting answers to as many questions as he could about the Swiss assets. M47, C31, C35. What he learned he promptly reported to the heirs by letter dated August 30, 1977. C37. On the date of Mrs. Mori's death, the following assets were in the "E. Glorida, G22" account:

Securities (Market value)	$1,413,394.00
Cash (U.S. Dollars)	6,163.83
Cash (Swiss Francs $7,979.30 @2.605)	27,247.33
Certificate (matured on Sept. 11, 1975)	160,000.00
Total	$1,606,805.16[3]

He learned further that the assets had been gradually withdrawn between August 7, 1975 and November 5, 1975 and

[3] Three years later in his first formal accounting (C59), Capaldi refined the Swiss asset figures as of Mrs. Mori's death as follows:

Miscellaneous Securities	$1,413,394.00
Div. Declared—Lykes-Youngston	513.75
Accrued Interest Receivable	2,649.38
Cash	193,411.16
Total	$1,609,968.29

placed in the Union Bank and then, for the most part, redeposited at Swiss Credit in the name of the Estate of Olive Mori on May 18, 1977. C39, C40, C70. It is during the August 1975 to May 1977 period that they were in the "Maraflora" account under Eugene's control. *Supra* p. 4. For the next year Capaldi, the Administrator and the beneficiaries wrestled with Eugene and his lawyers and the Swiss Credit Bank for statements sufficient to file amended State and Federal Death tax returns and State and Federal income tax returns. C5a, C37, C39, C40, C41, Mc8, M44, M49. Late in 1977 certain statements arrived. C5a. In the meantime, settlement of the estates stalled over the ownership issue caused by Eugene's personal claim to the assets. M44. Because of the problem Capaldi decided not to repatriate the assets and they remained invested in Switzerland until January 1979.

It further appears that in the period August 1977 to September 1978 the contempt proceedings were laid aside for the time being. It was probably just as well. In the first place in October 1977 the first of three major trials commenced: a will contest which pitted a will of Mr. Mori of July 1973 against one prepared by Eugene for him in January 1974 a few weeks before Mori went into the hospital. The latter will made several major changes favoring Eugene and was ultimately rejected by the Court on undue influence grounds. Mc1. Eugene appealed. Second, by the Fall of 1977 Eugene was no longer serving in any fiduciary capacity. Finally, by all indications, he would continue to insist on his Fifth Amendment rights.

However, by the early Fall 1978 the Administrator picked up the cudgel once again. Several parallel developments began. First, the two decedents' estates and the family members began negotiations to settle the questions of taxation and probate of the Swiss assets. Advice of Philadelphia counsel was sought. Largely based on his views the Administrator and Capaldi agreed that the Swiss assets and all income thereon would be "part of the probate estate of the estate of Olive E. Mori . . ." C45. No factual or legal basis for so providing arising out of the history of the assets was recited

in this practical, *ad hoc* agreement. Olive's estate agreed to pay all increases in Federal and State death and income taxes resulting from such inclusion for the years 1973 forward and any interest or penalties.

At the same time Janice Vondra agreed on a substantial payment to the benefit of the heirs under her father's will (Paragraph 3A and B and 4A and B of C46) in order, essentially, to approximate what they would have inherited had the assets been included in her father's estate.[4] These two agreements were embodied in comprehensive writings signed in December 1978 and called respectively The Estate Settlement Agreement and the Family Settlement Agreement. C45, C46.

The parties dispute whether Eugene was invited to participate in these negotiations. Compare Mori Brief, pp. 10-11 with McCrane Brief, p.62 and Capaldi Brief, pp. 21-22. It is clear that he did not do so. But, ironically, at about the time they were being finalized, Eugene's counsel sent a letter to the court in connection with the various pending orders against Eugene stating: "It is submitted that the information already in the hands of the Bank of New Jersey conclusively shows that the accounts, at the time of the decedent's death were the property of the Estate of Olive Mori." C76. Furthermore, upon notice to all parties including Eugene of the demand for court approval of the agreements by both estates Eugene failed to present any evidence on the ownership issue or his specific claim to the Swiss assets by gift or otherwise. C13a, p.56. Accordingly, in February 1979 the court approved them in both estates and no appeal was taken from that determination. See C17, C44.

With agreement in principle on these matters reached by October 1978, Capaldi was able to prepare and file an

[4] The bulk of Mr. Mori's estate goes to three trusts of which his three children are lifetime income beneficiaries. Upon their respective deaths the corpus of each trust goes to Joan McCrane's children, Mori's only natural grandchildren. Mrs. Mori in her will sought to redress this perceived injustice and Janice Vondra (her children were adopted) inherits a two-thirds interest with the remaining third divided equally between Joan McCrane and Eugene.

amended Federal Estate Tax return for Olive's estate. C83. The increased taxes on her estate amounting to $633,399.84 was paid with interest of $128,113.09 in April 1979. C59.

Simultaneously with negotiation of the two agreements, the Administrator pressed the Court to force Eugene to disclose what he knew about the assets during the years he controlled them. By Petition and Order to Show Cause dated September 15, 1978 and returnable October 19, 1978 he was directed to:

> . . . make discovery to this Court and to all parties in interest, including the Bank, of his full knowledge and information respecting the existence and whereabouts, or the nonexistence, of assets and accounts of decedent at the involving banks and banking institutions in Switzerland and elsewhere, and *all transactions and other matters affecting and relating to them, for and during calendar years 1973, 1974, 1975, 1976 and 1977, and particularly all accounts in the name of Eugene E. Mori or over which he has or had any power, control or right of withdrawal or transfer at Union Bank of Switzerland* and elsewhere during the period August 7, 1975 through May 1977, and all proceeds and records of the transactions and matters affecting and relating to said accounts; and . . . (emphasis added). C14.

The petition, affidavits and exhibits which detailed the bizzare situation support the broad order of the court requiring Eugene to disclose personal dealings in Switzerland beyond a mere accounting of the Swiss assets alone. C14. The effort was to permit trading of co-mingled assets and to corroborate that tangible trust assets had not been siphoned off for Eugene's personal use. Eugene did not appear on October 19. On November 13, another Order to Show Cause was signed returnable December 18, 1978, once again requiring him to appear and comply with the September 15, 1978 order. C15. This order contained the following significant provision:

> 3. Until Eugene E. Mori shall have substantially complied with paragraph no. 1 of the Order of this court

> dated September 15, 1978, with the terms of this Order and with the terms of all Orders arising out of proceedings for the discovery of Eugene E. Mori scheduled hereby to commence 9:00 o'clock a.m. Monday, December 18, 1978, and until further order of this Court, *the Bank shall not distribute, and is relieved of any duty to distribute, any assets of decedent's estate either to Eugene E. Mori or to any trust under decedent's wilful* of which Eugene E. Mori is a primary income beneficiary . . . (emphasis added).

An Order to Show Cause for similar relief was issued in the Olive Mori estate on November 28, 1978. C42. Once again, Eugene did not appear. Accordingly on the 18th, Judge Wood from the bench (the order signed January 4, 1979, C16) ordered him *inter alia* (1) to sign certain Consent, Release, Waiver and Covenant forms authorizing the Swiss banks to release information to the Administrator and Capaldi, C16, paragraph 3, (2) to pay various sanctions, C16, paragraphs 6 and 7 and (3) to be arrested, C16, paragraph 8. The order also permanently froze, on conditions, any distributions to Eugene from Olive's estate. C16, paragraph 4.

On January 4, 1979, doubtless in response to the bench warrant, Eugene appeared and another discovery proceeding started, his third in addition to the 1976 perjured deposition. Once again he invoked the Fifth Amendment more than 35 times and all with respect to the most pertinent questions. Mc42. While the January 4, 1979 proceedings were to be continued the issues raised by Mori's taking the Fifth particularly with regard to his refusal to sign the Release forms frustrated the inquiry and appeared to be an insurmountable obstacle to getting to the bottom of the matter.[5]

Later in January 1979, Capaldi, in an effort to comply with his duties under the Family Settlement Agreement, C45, Mc12, to "prosecute with reasonable diligence" proceedings against Eugene, commenced a Chancery action by summons and complaint for compensatory and punitive damages in-

[5] Trial Exhibit Mc42 does not include the passage. It is found in the full transcript of the proceedings on 1/4/79, p. 81, line 6 *et seq* of which the court takes judicial notice. *Evid. R.* 9(2)(5).

cluding travel expenses to Switzerland, interest . . . resulting from the failure to include the . . . Swiss assets in the [tax] returns; interest for failure to include income on said assets in the Fiduciary Income Tax returns and legal fees and other expenses. C43.

In April 1979, Eugene filed a Petition in Bankruptcy. C47, C48, C81. This action effectively stayed the pending probate proceedings for about a year as well as Capaldi's Chancery action. Mc11. Capaldi did, however, file a claim in bankruptcy for estate expenses, C49, C50, Mc10 and in the course thereof sought to prove about $165,000 in such expenses. Mc13. The Chancery case and the bankruptcy claim are precursors of the present claims. In bankruptcy, use and derivative use immunity were granted Eugene and he testified in a Section 205(a) discovery of his assets on March 26, 1980. Mc43; C92, Tab E. Eugene testified about his overseas assets and asserted that his mother and father intended the Swiss assets to be his by gift and complained that he had been restrained from litigating the issue in Switzerland. *Supra*, p.7. But, by and large no significant details regarding what happened to the assets between August 1975 and May 1977 emerged at the hearing. Mc43. Eugene's memory failed him and he was evasive. C92, Tab E. On April 15, 1980, the Bankruptcy referee signed an order remitting Capaldi's claims against Eugene and his claim to the Swiss assets to the State courts. C56.

In the Spring of 1980 Capaldi sought allowance of his first account as executor of Olive Mori's estate. The complaint included a request for instructions on distribution of both principal and income and on the issue of Eugene's "ownership interest," if any. C59. This request again invited Eugene's claim to the assets. Notwithstanding the court's judgments of February 1979, C44, dealing with the issue it continued to remain a nettlesome problem to Capaldi, particularly since it was he who now had to distribute the Swiss assets pursuant to Mrs. Mori's will. C55, C86, Mc12. His concern was justified. He had received a letter in August 1979 from Mr. Wasserstrum, Eugene's bankruptcy attorney, which sought to keep the ownership issue alive notwithstanding the Estate

and Family Agreements, C86, and Mr. Perskie, Capaldi's own lawyer, treated the matter seriously. Cf. M58 and C55. Accordingly, Eugene accepted the invitation. His brief states:

> A Notice of Settlement [of the first account] dated April 28, 1980 was served upon all parties, including Eugene. As to Eugene, the notice contained further directions that he should appear at the same time and place to "present all evidence, if any," that he might have with respect to this interest in such Swiss assets.
>
> Eugene responded by filing a Responsive Motion and Exceptions to Account requesting a dismissal of the application to determine ownership of the Swiss assets, a direction that such determination be made in Switzerland, or in the alternative, that there be a plenary hearing as to Eugene's ownership of such assets. Eugene further excepted to Capaldi's account insofar as it claimed ownership of the Swiss assets, which Eugene alleged were the subject of an *inter vivos* gift. Mori brief pp. 28-29.

Thus was fully posed, once again the issue of ownership and of Eugene's right to litigate it in Switzerland. The matter came on for hearing on July 11, 1980 and Judge Wood ruled:

> The fact is that the search for these assets has been a long and arduous one and it has been a search by the fiduciaries. It was determined by a judgment of this Court dated February 22, 1979, that a settlement agreement between the plaintiff, the plaintiff being the executor of the Estate of Olive Mori, and the Bank of New Jersey, the administrator pendente lite of the Estate of Eugene Mori; wherein the Estate of Olive Mori and the Estate of Eugene Mori agreed that the foreign assets are the property of the Estate of Olive Mori and not the Estate of Eugene Mori. The agreement was ratified and confirmed by the order of the Court and there being no further reason for delay, it was stated that the order would constitute a final judgment declaring that these assets were the property of the Estate of Olive Mori, deceased, and properly includable therein.

> The assets have been physically reclaimed and regained and are now, as I understand it, in the hands of the executor. I think that any exception Mr. Mori now makes to the account the theory of his individual ownership of these assets must be disallowed and I will so rule. See C61.

The signed order, paragraph 9, C60, dated August 5, 1980 stated:

> It is adjudicated and determined as a final judgment that the assets referred to throughout the administration of said estate as "Swiss Assets" belong to and are the property of the decedent's estate free and clear of any claim of any type, nature or description whatsoever on the part of Eugene E. Mori.

This judgment was appealed; but, on November 16, 1981 the Appellate Division by a *per curiam* opinion (A-261-80T3) affirmed, citing the above passage from Judge Wood's decision. C61. Distribution, including the Swiss assets, went ahead to beneficiaries other than Eugene, C68, because Judge Wood's order specifically provided:

> Notwithstanding anything to the contrary herein, no distribution shall be made at this time to Eugene E. Mori *as it would appear that the executor has a substantial claim yet to be liquidated against the said Eugene E. Mori.* (emphasis added), C60, para 13.

It will be recalled that by the Fall of 1978 Capaldi had sufficient information to prepare and file amended Federal Estate Tax returns and with the Estate and Family Agreements approved he proceeded to do so. *Supra*, p. 13. However, there was much information he still needed, C31, to prepare amended Fiduciary Income Tax forms (1041) for the years 1974 to 1977. C87. In fact, it was primarily the need for a detailed breakdown of income and capital gains for each of those years while the assets were at the Union Bank that stimulated the proceedings in the Fall of 1978 and the resultant freeze orders. *Supra*, 14-15. His first account

had also highlighted the dire need for this additional vital information:

> It is therefore, impossible, without the permission of Eugene E. Mori, to obtain the necessary information from the Union Bank of Switzerland, to compute the capital gains, the tax thereon, both Federal and State, interest payable and make a proper allocation between Principal and Income. C59.

After the account was allowed he continued to press for the information, C62, but got nowhere. C87, Mc17, C63, C64 and C65. Then, as part of a strategy to convince Judge Wood to relax the freeze orders, Eugene consented to an order directing him to account as co-executor. C66. By an unsigned Certification, accompanied by his attorney's letter dated August 6, 1982 (C89) Eugene filed a complaint on notice with what was described as a "Certification and Account. . ." (for the period July 16, 1975 to August 2, 1977), C67, Mc57, Tab J. It contained no figures or schedules whatsoever in compliance with Rules 4:87-1 and 4:87-2 and broadly claimed:

> During that period, no control was exercised over any assets of the estate by me with the exception of certain information allegedly known to me regarding foreign assets which was requested by the co-executor.

Numerous exceptions to this "account" were filed, Mc57, Tabs K, L & M, and out of those proceedings an order was entered directing yet another deposition of Eugene which ultimately took place on November 15, 1982. This purported account was never finally settled and is one basis for affirmative relief sought by Eugene. Mc57, Tab J. Nor, needless to say, were the freeze orders vacated.

However, on August 12, 1982 Eugene finally delivered to Capaldi a voluminous stack of bank statements in French from the Union Bank covering the period August 1975 to May 1977. See M141. Careful examination of these statements permitted Capaldi to arrive at yearly income figures and cleared up one mystery that had nagged him for three years

and had long held up settlement of the estate. Mc58, Tabs 3, 4 and 10.

He had discovered in September 1979 as the result of information provided by Swiss Credit that 7,000 shares of stock in four companies and 175 shares of Swiss Credit in "E. Glorida G22" on July 16, 1975 were not returned in May 1977. C51, Mc60, Tab 13. Swiss Credit, at the time, could not specifically answer Capaldi's inquiry, except as to its own stock.[6] C52. Capaldi reported the missing stock to his lawyer. C53. In his Section 205(a) examination in March 1980, *supra*, p. 16, Mori had denied removing the stock from the account, C92, Tab E, p. 29, line 21 to p. 31, line 1, and in April 1980 produced a Union Bank letter confirming that. C54. Capaldi's study of the Union Bank statements over two years later satisfied him that Union Bank had sold the stock as part of routine portfolio management and reinvested the proceeds. C70. But he also discovered that (1) $42,100 had been withdrawn on October 15, 1975 and not returned until May 18, 1977 when $47,000 was credited; (2) that on August 25, 1975, 9,962 francs were "transferred" with no supporting voucher and recredited on May 18, 1977; and (3) that the Union Bank charged the account 4,100.20 francs ($1,625) for various items listed in French for which the court was given no translation. ExC to C70. These facts were reported to all the beneficiaries. C70.

When these transactions were questioned at his November 1982 deposition Mori answered:

> Q. Do you adopt your counsel's statement that you regard the Maraflora account as an account consisting of your assets?
>
> A. I regard it, I think I already testified earlier in this deposition, that I felt that document [C19] in fact,

[6] At the same time Capaldi also asked for and received from Credit Suisse an explanation for an $8,000 credit posted to the account in April 1979 for "unused legal fees," C51, which indicated $10,000 had been paid to the Bank as a reserve "for possible legal expenses of our Bank," $2,000 of which was used and the remaining sum "paid into the Estate's account." C52. Eugene claims the $8,000 stating that he paid the original $10,000. The court disposes of this claim at pp. 45-46.

made it my account. Made it mine upon the death or incompetence of my parents.

Q. Which document?

A. The document, I guess it would be EM-6. [C19]

Q. So that I understand, EM-6—

A. And under prior documents which I believe existed that my father had executed.

Q. But which we don't have here?

A. We don't have here.

Q. Do you have them somewhere?

A. No, I don't. But I believe the bank would.

Q. Now, EM-6 is the power of attorney your mother executed on August 14, 1974?

A. Yes.

Q. And it is your understanding today that by virtue of that document the assets that were at any time in an account at the Union Bank of Switzerland called Maraflora Foundation are your assets, is that correct?

A. Yes. Mc44, Tab 15.

* * *

Q. During that period of time did you draw any monies out of the accounts?

A. I'm not sure. If I did they were all returned to it. Mc44, Tab 34.

* * *

Q. Is it not a fact that at about the time that you closed out the account at Union Bank in Switzerland you restored some monies to it?

A. I think I did.

Q. Why did you do that?

A. To make the account complete.

Q. What do you mean to make it complete?

A. Exactly where it was when it was put in there.

Q. What had made it incomplete?

A. I believe I withdrew some funds and put them back.

Q. When did you withdraw the funds?

A. I don't recall the dates.

Q. How much did you withdraw?

A. I don't recall that either. But whatever may have been withdrawn was returned. Mc44, Tab 39.

And see particularly Mc44, Tab 37, a four page passage wherein Eugene is questioned specifically about the $42,110 withdrawal but evasively answers by saying he can't read French. The deposition of November 15, 1982 is also noteworthy because in further discovery precedent to the trial herein (the third major trial) Eugene, by answers to interrogatories dated October 10, 1985 (Mc30), incorporates by reference the deposition (Mc44) including, of course, all the several times he continued to take the Fifth Amendment.

Before leaving 1982 it needs be pointed out that Capaldi filed a second accounting on notice covering the period January 1, 1980 to April 30, 1982. C68. Count II of his complaint sought recovery for "expenses and loss of income incurred by the fiduciary as the result of the non-cooperation of the said Eugene Mori" and attached as Exhibit C a detailed statement thereof totalling $214,088.56 together with interest. See also C71. This count was severed by Judge Wood for later disposition when the account itself was approved in May 1983. C69. It is this pleading which, with Capaldi's Chancery action (dismissed without prejudice for want of prosecution, R.1:13-7, Mc18, Mc19, Mc20) and his bankruptcy claim, forms the focal point of the present case. See *supra*, p.15.

While Capaldi was prepared to proceed with his claims against Eugene, Mc24, Judge Wood decided to proceed with the guardianship accounting and exceptions (the second trial) and did so during the Spring and Summer months of 1983. Unfortunately, a decision therein was delayed until December 1984, due to Judge Wood's untimely death. This Court read the record of that trial and in an unpublished opinion not only surcharged Eugene for matters unrelated to the Swiss assets but also denied his claim for guardianship commissions of $70,000.00 due to his conduct respecting the Swiss assets. That judgment, which also reserved the accounting and damage issues surrounding the Swiss asssets, Mc57, Tab H, is on appeal.

While the guardianship case proceeded Capaldi received for the first time a challenge to his June 1972 calculation of expenses and loss to the estate. C71. It came in the form of a letter dated July 6, 1983 from a C.P.A., Earl Morgenstern, who advanced the theory, as recited in the Capaldi brief p. 40 (which the court accepts as a substantially accurate statement of the Morgenstern theory), that:

> . . . [Mori] was entitled to an offset for the income generated by the Swiss assets while under his control, and that the beneficiaries were entitled to no more than they would realize after their payment of taxes on the distribution they received. His premise was that for tax purposes, because the Estate would simply redistribute the dollars recovered from his to the beneficiaries, that the Estate would have no tax liability. Further, because parts of the gain generated by the Swiss assets were capital gains, the loss of use of this money to the Estate should be calculated giving effect to the taxation of capital gain at reduced rates.

See also pp. 64-66, Mori brief. As a result Capaldi prepared new figures which incorporated these criticisms and circulated them. C72. Instead of expenses of $214,088.56 without interest and $291,044.16 with interest, C71, the new figures[7]

[7] Capaldi revised the starting expenses, as well, between 6/7/82, C71, and 11/17/83, C72, largely to reflect the addition of about $80,000 in counsel fees allowed in the second accounting, C69. These expenses were carried forward in C73.

gave credit for offsetting income and tax savings and resulted in net expenses with interest of $41,089. C72, M124. At the end of 1983 Capaldi submitted his calculations to I.R.S. for a ruling amidst substantial objection from McCrane. M131, M9 and M11. Capaldi, while he accepted in the abstract the mathematics and "fairness" of these credits, he admits he made no "wrongdoer assumption" and always understood that both IRS and the court would have to approve and credit to Eugene. M9, M124.

After IRS refused to rule on the matter and other efforts to settle bore no fruit, in August 1984, Capaldi asked the court for instructions and again sought damages. M7, Mc23. McCrane counterclaimed for damages against Capaldi for any losses sustained by his presentation of the offset and tax theories and in the context of these issues all prior issues including approval of Eugene's own accountings, *supra*, p. 20 and Count II of Capaldi's second complaint for Accounting, *supra*, p. 24 were consolidated herein. See my order, February 29, 1985. Management was instituted and discovery permitted during 1985. The trial commenced January 28, 1986 and concluded March 18, 1986.

CONCLUSIONS

In March 1974 and again in July 1975 Eugene accepted the responsibilities of a fiduciary. That is a generic role defined in Black's Law Dictionary, Third Ed., as "a person holding the character of a trustee, or a character analogous to that of a trustee in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires."

Eugene's conduct during the relatively short spans of time (about 18 months as co-guardian and 24 months as co-executor) he was vested with those duties challenges the essence of being a "fiduciary" and invites resort to fundamentals. Bristling with supportive footnotes which I need not cite, the most respected treatise in New Jersey on the obligations of a fiduciary sets forth those fundamentals succintly:

> He has a duty to . . . inform [the beneficiaries] of matters known by him which materially affect the trust. He is under other duties, . . . including a duty to . . . administer the trust solely in the interest of the beneficiaries, [and] to keep trust funds separate . . . 7 *N.J. Practice (Clapp, Wills and Administration)* (3 ed. rev. 1982), §982 at 10-11.
>
> * * *
>
> Executors, administrators, guardians and trustees are under a duty to keep and preserve accurate accounts in a form and with entries clear to a stranger examining them. A primary incident of a fiduciary's obligation is to be able to make, and to make, a prompt, full and frank disclosure and account of his stewardship and to give to the beneficiary, at reasonable times, complete and accurate information as to the nature and amount of the trust property, and to permit him or a duly authorized person to inspect the subject matter of the trust and the accounts and vouchers. 7 *N.J. Practice* (*Clapp, Wills and Administration*) (3 ed. rev. 1982), §1446 at 541, 542.

In addition to these duties Eugene, after his ward died and he resigned as co-executor, continued to bear clearly defined duties to the succeeding and remaining fiduciaries and to the ultimate beneficiaries. 7 *N.J. Practice, supra* §1105, *N.J.S.A.* 3A:6-55 through 58 (Now *N.J.S.A.* 3B:14-4 through 7); *N.J.S.A.* 3A:11-5 (Now *N.J.S.A.* 3B:14-22).

It is my duty to conclude that Eugene in bad faith, intentionally breached these duties thereby wronging his sisters and their children, whose interests he took an oath to protect. Mc67, *Nappe v. Anschelewitz, Barr, Ansell & Bonello,* 97 *N.J.* 37, 49 (1984). His three most serious offenses were: (1) the failure to disclose matters materially affecting the estate, (2) the failure to keep trust funds separate and (3) the failure to account.

FAILURE TO DISCLOSE MATTERS MATERIALLY AFFECTING THE ESTATE

Eugene failed to disclose the location, extent or composition of the Swiss assets for about three years, March 1974 to May 1977. While, as I have held, the family knew generally about their father's interest in foreign assets no one except

Eugene knew any of the details and upon Mr. Mori's incompetency and death they had a right to that information. Mrs. Mori shares this breach with her son, a matter the court commented on it its opinion in the incompetency estate. But upon her death the responsibility lay solely with Eugene. After May 1977 he failed to disclose, until August 1982, the yearly income and gains in the assets while they were under his exclusive control and never has revealed the existence or whereabouts of his personal accounts with which these assets were so readily co-mingled. These were, clearly, material facts affecting the estate. *Cohen v. First Camden National Bank & Trust Co.*, 51 *N.J.* 11 (1967); *Branch v. White*, 99 *N.J. Super.* 295, 307 (App. Div. 1968).

The court can only ascribe the worst motives to this non-disclosure implemented as it was by lies. Eugene sought to prove that his motive was an honest, but misguided, attempt to honor his father's wish that these assets be free of his probate estate and its attendant taxes and his parents' joint intent, embodied in the power of attorney treated as a deed of gift, that he, Eugene, was to have the assets. Evidence of the facts to support these defenses was rejected during the trial for reasons that are fully explicated on the record and need not be repeated here.

Suffice it to say, however, that Eugene's belief that the assets were his by *inter vivos* gift did not justify his non-disclosure of them so that all parties, including himself, could assert and protect their respective interests. *II Scott on Trusts* (3rd Edition), §170, cf. *N.J.S.A.* 3B:14-36. When the cat finally jumped out of the bag, his attempt to have the ownership issue heard in Switzerland was self-serving forum shopping in its most virulent form, clearly done in bad faith with the idea of both securing a foreign state's favorable ruling and escaping death taxes.

Having been properly denied the chance to litigate in Switzerland, Eugene could have vigorously litigated ownership here. He never did. Unfortunately for him there were two interrelated problems: (1) the fear of prosecution for tax evasion for the years 1974-1977 when the income on the

assets went unreported and (2) the fundamental weakness of the *inter vivos* gift theory. See M3. The court must conclude that had Eugene had a strong case on the alleged *inter vivos* gift, he would have waived the Fifth and either made his peace with the I.R.S. or taken a calculated risk of prosecution. Afterall, there was $1.6 million at stake. The fact that Eugene did not take this tack suggests he knew he would lose on ownership in any event, and, hence, waiver of the Fifth wasn't worth the risk. The evidence points directly to Eugene's knowledge that the gift theory was either unprovable or untrue. In June 1977 he said he didn't know who owned the assets and that his Swiss lawsuit was only as a beneficiary. *Supra*, pp. 8-9. In December 1978, his counsel wrote Judge Wood asserting the assets clearly belonged to Olive. C76. The Power of Attorney, C19, itself, while substantially broader than the forms used here, to a sophisticated layman does not have the indicia of a deed of gift. When it was given there was neither delivery of the assets nor relinquishment of control over them by either Mr. or Mrs. Mori. *In re Dodge*, 50 *N.J.* 192 (1967).

Accordingly, the court must reject the purported good faith behind the failure to make a prompt and full disclosure of all the facts touching on the Swiss assets. What is left is the conclusion that Eugene intended to deny the beneficiaries of their respective inheritance and the taxing authorities their lawful due. As such the decision not to make a full and prompt disclosure was entirely self-serving and inconsistent with Eugene's duty as a fiduciary. *II Scott on Trusts*, §173.

THE FAILURE TO KEEP TRUST FUNDS SEPARATE

Between August and November 1975 Eugene secretly transferred the Swiss assets from Swiss Credit Bank at Zurich and the "E. Glorida" account to the Union Bank at Lausanne and into an account there in his name but entitled "Maraflora Foundation." Certain hard evidence provided by the slips found by Mrs. McCrane, C1-H, C1-L and C1-D, and Eugene's own grudging admissions in his bankruptcy proceedings,

November 1982 deposition, C81, p. 9, Mc43, Tabs 7, 8, 10 and 11, Mc44, Tabs 7, 19, 20, 21, 32 and 39, and the trial testimony lead the court to find that Eugene has and may still have several coded accounts of his own in Switzerland, probably at the Union Bank, some containing substantial sums. See M150 and M151, which are Eugene's 1983 and 1984 income tax returns disclosing "other income" as to which he takes the Fifth. The 1984 return admits the existence of foreign accounts. In particular, the trial revealed the probable existence of a Maraflora B Foundation.

In view of the above and the unsatisfactorily explained use of the $42,100 and 9,962 francs, *supra*, p. 22, the court must conclude that Eugene co-mingled the Swiss Assets with those of his own. 7 *N.J. Practice, (Clapp, Wills and Administration)* (3 ed. rev. 1982) S993. He clearly believed and acted as if the assets were his, *supra*, p. 22-23. As to such conduct Professor Scott says:

> It is the duty of a trustee to keep the trust property separate from his individual property and to see that it is earmarked as property of the trust. If a trustee deposits trust funds in his personal account in a bank together with his own funds, or even if he has no funds of his own in the account, he commits a breach of trust . . . *II Scott on Trusts (3rd Edition)* §180.2.

It was the co-mingling of the assets which, while not the source of direct loss to the estate, (Capaldi was eventually able to account for all of the assets, C70) caused great delay and expense in trying to unscramble. It was not until May 1977 that the assets were physically unscrambled and it was not until August 1982 that records were produced showing what had happened between August 1975 and May 1977. Getting that much was worse than pulling teeth. C63-65. And to this day, the details of Eugene's own accounts are non-existent precluding effective analysis of the complete "Maraflora Foundation" and the uses to which the assets were subjected, the risks involved and the profits and/or losses sustained. Cf. *In re Flasch*, 51 *N.J. Super.* 1, 27-30 (App. Div. 1958).

THE FAILURE TO ACCOUNT

The court holds, finally, that Eugene has never "accounted" for the Swiss assets either as co-guardian of his father's incompetancy estate or as co-executor of his late mother's estate. His resignation as co-executor was specifically conditioned by court order upon such an accounting. C33. As used in this context "accounting" is a term of art. 7 *N.J. Practice, supra,* §1446; *R.*4:87-1 and *R.*4:87-2. Thus Eugene has never formally charged himself with the Swiss assets, income or gain thereon or set forth changes made in investments or requested principle or income allowances. Eugene's delivery of the Union Bank statements to Capaldi in August 1982 was not an account. While they may have permitted Capaldi to reconstruct what happened to the assets (C70) and to prepare reasonably accurate income tax returns, Eugene himself has never, under oath, sworn to the accuracy of any figures.

Futhermore, Eugene's position with regard to accounting has been taken in bad faith and is contradictory. In March 1982 in the incompetancy estate (C-2560-77) he signed a certification accompanying a complaint in which he asked for approval of his "account" (no figures at all being included, other than those prepared by the executor of the deceased co-guardian, Olive E. Mori.

* * *

(2) Although I have included in my account information as may have been contained in Mr. Capaldi's account regarding [the Swiss assets], it is inappropriate for me to be charged with receipt of or a duty to account for these assets in this proceeding.

(3) These assets were the subject of an *inter vivos* gift from Eugene Mori to Olive Mori while he was competent and before the inception of the Guardianship.

(4) Thus, when my mother transferred the assets to account #291300 Mrs. E. Glorida, G22, at the same bank on August 22, 1974, my mother was only formally

transferring to her name assets which were already hers. Mc57, Tab F.

Three months later in June, in Olive's estate proceedings (75-1029), Eugene filed a complaint demanding approval of an "account" (again, no figures) in which his attorney lodged in the Surrogate's office and served a certification stating Eugene would sign a certification a copy of which was attached. C89; Mc57, Tab J. While, in fact, it never was signed despite the good faith of the attorney and the numerous chances Eugene has had to sign it, the court must take it as his position as it was read over the telephone to him and certified "correct" to the attorney. Mc57, Tab J. It stated:

> 2. During that period, no control was exercised over any assets of the estate by me with the exception of certain information allegedly known to me regarding foreign assets which was requested by the co-executor.

The statement is patently false to the extent that Eugene denies exercising any control "over any assets of the estate" since he clearly exercised exclusive control over the Swiss assets which in his March certification he asserted were Olive's by gift from his father. To the extent that the certification is intended to suggest that Eugene had no duty to account either because Capaldi had done so or because by 1982 Capaldi had exercised complete control himself over the Swiss assets it also fails. It is clear that co-executors must at least account for those assets that come into their hands for any period joint control is not exercised by both. Cf. 7 *N.J. Practice, supra* § 1479. *Duncan v. Davison*, 40 *N.J. Eq.* 535 (Prerog. 1885), *Tehan v. Maloy*, 45 *N.J. Eq.* 68 (Chan. 1889), Cf. *N.J.S.A.* 3B:14-22.

Once again, time, effort and unnecessary expense was visited upon the estate in the doing by others what Eugene should have done and which is clearly reflected in attorney time and Capaldi's own time. C31, C37, C40, C62.

SURCHARGE AND PUNITIVE DAMAGES

For the above reasons, Capaldi and the beneficiaries have clearly and convincingly established Eugene's serious fiduciary misconduct both during and after his formal status as such. Accordingly, the estate is entitled to surcharge

Eugene and, because the court is satisfied of the outrageous nature of his actions, to punitive damages.

The amount of the surcharge is the sum of the reasonable and necessary expenses incurred by the estate including counsel fees related to the investigation for and recovery of the Swiss assets, for accounting for same and other expenses caused the estate, primarily interest. In addition the surcharge shall include interest on the expenses at the rates applicable for the periods set forth by Capaldi in Exhibit C73. See Mc58, Tab 2.

C73, without its credits for income received and tax savings, lists the expenses which the court has categorized as follows:

1. Direct expenses:	
(a) Travel	$ 2,462
(b) Fee to Swiss Atty	875
(c) Calls to Zurich	78
Total	$ 3,415
2. Interest on unpaid:	
(a) Federal Estate Taxes	$107,102
(b) Inheritance Taxes	17,257
(c) Federal Income Taxes (1975-1977)	10,790
(d) State Income Taxes	2,026
Total	$137,175
3. Counsel Fees & Costs:	
(a) Allowed on 1st Acct	$ 58,925
(b) Allowed by App. Div	14,218
(c) Allowed by 2nd Acct	66,792
Total	$139,935
4. Miscellaneous:	
(a) Certified Reporter Svs.	$ 313
(b) Accountants' Fees	12,875
Total	$ 13,188
GRAND TOTAL	$293,713

All of these expenses come under attack: (1) as being unnecessary and unreasonable; (2) as being subject to an offset for the income and capital gains obtained while the assets remained undistributed both in Switzerland and the United States from July 16, 1975 to July 12, 1983; and (3) as being unrelated to or not caused by Eugene's conduct relating to the Swiss assets.

The court rejects the first and third arguments out of hand as to all expenses except counsel fees, *infra* p.43. The travel expenses of Capaldi and his counsel to Switzerland in August 1977, the telephone calls to Switzerland and the fee paid to Swiss counsel were entirely reasonable and clearly occasioned by Eugene's long-delayed revelations regarding the assets in May 1977 and his steadfast unwillingness thereafter to part with sufficient details to aid Capaldi in accounting for the assets or preparing tax returns. Cf. Mc58, Tab 2: c35.

The second, or "offset", argument is also rejected. Eugene seeks to offset against the expenses the interest and capital gains received on the unpaid taxes while the estate remained undiscovered and undistributed. By a special brand of mathematical ledgermain, Eugene seeks to have the court credit him with 2½ times the yield on the assets arising from capital gains since the net benefit to the heirs is equivalent to such as the result of the favorable tax treatment accorded capital gains. In addition, since the interest, counsel fees and other expenses were deductible for either income or estate tax purposes, Eugene seeks only to reimburse the Estate, if at all, for the net expense considering the reduced taxes resulting from those increased expenses.

There are two themes running through these contentions: (1) the court should approve in principle the idea of crediting a wrongdoing fiduciary with benefits to the estate or its heirs incident to the wrongful act; and (2) the court should consider the estate's and/or beneficiaries' federal tax situation in awarding damages.

There is no question that the estate gained mathematically from the delay in paying taxes on the Swiss assets. Swollen by unpaid taxes, they earned about 10% per annum

in the three years they went unpaid and when they were paid the interest was only 7% per annum. (Capaldi was able to talk both the I.R.S. and New Jersey out of penalties.) It is also true that the yield included capital gains upon which less income tax was due than had the whole of the yield been ordinary income and the taxes were further reduced by increased deductible expenses. C72.

These themes come down to the argument that there has, in fact, been no loss; or, that any loss was self-mitigating. It is, in effect, argued that recovery of the expenses from Eugene without offset for the received yield and reduced taxes would be a double recovery, a result not countenanced in the law of damages.

But the traditional analysis of cases in probate has eschewed the question of loss to the estate; rather, it has focused on the conduct of the fiduciary with regard to each investment decision. 7 *N.J. Practice (Clapp and Black, Wills and Administration,)* (Rev. 3rd Ed. 1984) §1013, p.108, *Pennsylvania Co. v. Gillmore,* 142 N.J. Equity 27 46-47 (Ch. Div. 1948); *Restatement of the Law, Trusts,* 2nd §213; *Scott on Trusts,* 3rd Ed. §213. Thus where there are "separate and distinct" breaches of trust losses suffered as the result of one breach cannot be offset by gains on the other. *Gillmore, supra.* Under this analysis investments in stocks are viewed as "separate and distinct" decisions rather than as management of a single portfolio, and the losses incurred on one imprudent investment in the portfolio are surchargeable notwithstanding an overall gain in the portfolio itself. *In re Bank of New York,* 35 *N.Y.* 2d 512, 323 N.E.2d 700 (Ct of Appeals, *N.Y.* 1974); *Pennsylvania Co., supra.* The policy and logic of this rule is given by Scott:

> There is no injustice in holding that where the trustee commits a breach of trust he should bear the risk of loss and should not have the hope of profit. It may be argued, however, that it is unjust where there are both profits and losses that the trust estate should have the profits and that the trustee should bear the losses, since the result is that the estate is better off because of the breaches

of trust and the trustee is worse off. Any other result, however, might put a temptation in the way of the trustee to commit breaches of trust. Thus if the trustee has invested a part of the trust funds in the purchase of improper securities and has incurred a loss, he might be tempted to use another part of the trust funds in purchasing other improper securities and with the hope of making a profit which, it is true, he could not keep, but which he might use to diminish the liability which he had already incurred. If through a breach of trust he has made a profit, he might be tempted to commit a further breach of trust, expecting that if a loss should result he would incur no liability if the loss did not exceed the profit made through the earlier breach of trust; but in such a case there is no benefit accruing to the trustee personally, as there is if he first incurs a loss.

Moreover, it is clear that where the trustee makes a profit in the proper administration of the trust, he will not be permitted to offset that profit against any loss which may result from a breach of trust. Thus if the trustee properly invests a part of the trust funds in the purchase of bonds which he later sells at a profit and invests the balance in speculative securities which he sells at a loss, he cannot offset the profit against the loss. It would be rather extraordinary to give him any greater privilege by showing that the first investment was in breach of trust. It would be absurd to hold that he is in a better position where the first purchase is in breach of trust than where it is a perfectly proper purchase. *III Scott Trusts (3rd Edition)* §213.1 p. 1715-16.

But the question here is not offsetting gains and losses on investments but whether it might not have been reasonable, in any event, to delay paying taxes in view of the low interest rate charged by the taxing authorities in relation to the market yields of the Swiss assets. If so, then to surcharge Eugene for the interest cost would be inequitable. This issue was discussed in a recent article, *Fiduciary Duty to Minimize Taxes* by Professor Mark L. Ascher, found in 20 Real Property, Probate and Trust Journal 663, 673-677 (Summer 1985)

which collects and discusses the decided cases nationwide. These cases suggest that under certain circumstances, a deliberate decision, made in good faith to delay payment of taxes thereby incurring interest and penalties, might be held prudent and reasonable where the estate benefits from the interest rate differential, *Ascher, Id; Chase v. Pevear,* 383, *Mass.* 350, 361-2, 419 *N.E.*2d 1358, 1365 (1981); *Denvir v. Park,* 169 Mo. App. 335, 152 *N.W.* 604 (1912); *In re Phelps' Will,* 55 Misc. 2d 224 (1967); *In re Estate of Byrnes,* 159 *Misc.* 302, 313, 287 N.Y.S. 961, 975 (Sur. Ct.), modified on other grounds, 160 *Misc.* 895, 290 *N.Y.S.* 949 (Sur. Ct. 1936); *Hooker v. Hoskyns,* 328 P.2d 404, 414 (Okla. 1958); *Welch v. Welch,* 235 Wis. 282, 326-27, 290 *N.W.* 758, 778-79, modified on other grounds, 235 Wis. 352, 293 *N.W.* 150 (1940). But see *In re Estate of Shulsky,* 34 A.D. 2d 545, 546-47, 309 *N.Y.S.* 2d 84, 88 (1970) (no offset where executor failed to prove the funds later used to pay taxes drew interest.)

There is one case, however, *Vrendenburg v. Jones,* 349 A.2d 22 (Del. Ch. 1975), which *Ascher* notes fails to cite these cases, is contrary to them, and clearly holds no such offset should be allowed. In that case, citing a Delaware statute making fiduciaries personally liable for payment of death taxes on pain of forfeiture of commissions, the court held:

> The [i]mport of the [statute] clearly indicates a legislative intent that an executor shall not speculate with tax monies due the State even if his efforts are earning the estate a return greater than the penalty accruing in favor of the State. It also mandates that part of the executor's responsibility is to pay the taxes when due if the estate has the funds available, and makes him personally liable for the consequences if he does not. How, then, can it be a defense to say that the violation of a statutory duty is permissible so long as the violation turns out successful in earning the estate more income than is needed to pay the penalty for the violation?

Both New Jersey and Federal law contain similar provisions. *N.J.S.A.* 54:35-2; 26 *USCA* §2002; Cf. *In re Maurice's Estate,* 249 A.2d 334 (1969). Agreeing that the practice (of

deferring tax payments beyond their due date) is "blatantly contrary to the stated policy of the tax statutes," *Ascher, Id.* footnote 64, *Ascher* acknowledges *Vrendenburg* points "in a direction that future precedents might follow."

Indeed so, as this court will in this case. The cases cited favoring offset do so in a narrow range of rather exceptional circumstances where no one objects, where the fiduciary acts with utmost good faith, is unable to pay the taxes when due or is otherwise able to prove his entitlement to an offset. McCrane's expert opined that no fiduciary should be permitted an offset where he had not consulted the beneficiaries and had set aside a reserve to pay the tax liability.

Of course, none of these criteria are present here. Eugene committed gross violations of fiduciary responsibility in secreting the Swiss assets well beyond the time taxes were due on them in an account in a fictitious name under his exclusive control which he, in fact, treated as his own money. And all of this was without any semblance of choice on the part of his sisters or Capaldi. The fact that while so invested, the funds accrued more money than the cost to the estate should not now redound to Eugene's credit. The estate suffered increased expense, risk and delay in its ultimate objective—distribution to those entitled and for that reason he is surchargeable without credit for those reasonable and necessary expenses. *Vrendenberg, supra.*

Since the court has rejected the offset argument altogether it need not rule on whether such offset should be calculated taking into account the favorable tax treatment of capital gains, or the fact that the estate and/or beneficiaries paid lower income taxes as the result of the higher expenses most of which were deductible. The court notes, however, that the recovery of deductible expenses by the estate and/or beneficiaries as the result of the judgment herein will probably result in taxable income thus tending to cancel any benefit they may have received. Cf. M124, p.2.

As to the claim for recovery of counsel fees, *supra* p. 36, the court in a post-trial letter dated July 30, 1986 to counsel requested affidavits providing a basis for allocating counsels'

services to matters relating to the Swiss assets. The effort was, of course, an attempt to eliminate the need for additional testimony on the subject. But that does not now appear possible. In the first place, no counsels' services since June 1, 1983 have been allowed the estate there having been no accounting since then. A portion of such services, if not all, will be recoverable against Eugene by way of damages on the basis of the rulings herein. Secondly, review of the responses received to the court's letter satisfies it that more precision is required to justly allocate the fees allowed by Judge Wood in the First and Second Accountings to Eugene based upon his conduct as found herein. For that purpose a plenary hearing is hereby scheduled for Monday, January 12, 1987 at 10:00 a.m. Mr. Cooper shall represent the Estate and shall call as witnesses all the attorneys, including himself and Mr. Perskie, RPC 3.7(a)(2), and Mr. Capaldi (as to the $12,875 accountant's fees, C73) to prove the services which were reasonably required as a result of Eugene's conduct. The perimeters of the testimony shall be confined to the post trial submissions as to services rendered before June 1, 1983, and, as to after then to affidavits of services which shall be filed no later than December 15, 1986. As to the allowances made by Judge Wood in the First and Second Accountings and by the Appellate Division no issue may be raised as to the number of hours or the hourly rate—the only issue will be the allocation of the time to the various Swiss asset problems. No further discovery on the matter shall be permitted, except time logs or computer printouts of time records shall be supplied if requested within twenty (20) days of the request. All counsel are directed to meet, at least once, prior to the hearing in an effort to settle the matter after December 15, 1986. The court's conference room is available for the purpose upon specific prior arrangement.

There is one other matter on which Eugene seeks a ruling. In a pre-trial motion, held by the court for trial, he sought recovery of the balance of $8,000 posted to the Swiss account in April 1979. C51; C52; *supra* p. 21. He claimed in an affidavit that in 1976 or 1977 he deposited $10,000 with Credit Suisse "for purposes of their legal department perform-

ing various legal services on my behalf." He offers no corroboration of his payment other than the exhibits already referred to but there is a high circumstantial likelihood that he did pay it. At the same time two complete accountings, C59 and C68, were settled by final judgment without one mention of this item by Eugene and the other parties now resist any claim by him for the amount. Furthermore, ownership of the Swiss assets was ruled upon by Judge Wood and he ultimately was affirmed.

This issue is addressed to the sound discretion of the court. It is, in effect, at this late date an appeal to be relieved from the effect of the court's prior judgments settling two intermediate accounts. 7 *N.J. Practice, (Clapp, Wills and Administration)* §1473 and 1474. Under the circumstances I am satisfied Eugene should be allowed an $8,000 equitable set-off against counsel fees ultimately found to be due from him as the result of the hearing herein scheduled together with interest thereon calculated from April 19, 1979, the date Swiss Credit credited the account at the same annual rates Mr. Capaldi uses for those sums due from Eugene. *Supra* p. 36. Even in the face of gross wrongdoing there is little, if any, equitable basis on which the estate can claim this money, and hence the maxim "he who seeks equity must do it," in my opinion applies.

We turn now to the issue of punitive damages. The subject is reasonably well settled in our law. *Leimgruber v. Claridge Assoc. Ltd.*, 73 *N.J.* 450 (1977); *Nappe, supra.* Given the standards of the law, the court is amply satisfied that Eugene's conduct both in his fiduciary capacity and thereafter documented at pages 2 to 35 of this opinion mandates an award of punitive damages. The court, in short, has been outraged by his conduct which clearly exalted his interests over that of his sisters and their children, was willful and in reckless disregard of the duties of fiduciaries and rights of beneficiaries and highly prejudicial to an orderly and prompt settlement of the estates. Nonetheless, I momentarily stay any award to consider several factors which might affect the imposition and the amount of such an award.

First, and most important, is Eugene's assertion of the Fifth Amendment with regard to the Swiss assets and his own foreign personal accounts. In 1967 the Supreme Court of the United States ruled:

> In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in *Griffin v. State of California,* 380 *U.S.* 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106, the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly." *Spevack v. Klein,* 385 *U.S.* 511, 515 (1967)

Is any award of punitive damages on the facts here to "costly" a price to pay for the exercise of the Fifth Amendment privilege? Would an award of some amount stand constitutional muster but a higher award be infirm? *National Acceptance Co. of America v. Bathalter,* 705 F.2d 924 (7th Cir. 1983). The issue cannot be avoided, it seems, on the argument that Eugene's exercise of the Fifth was improper either (1) because the privilege was the estate's and not his or (2) because, in the face of its continuous assertion Judge Wood nonetheless continued to order Eugene to disclose all the facts regarding the Swiss assets, implying that he found no privilege existed, or that Eugene had waived it. The fact is that Eugene was personally threatened by a Federal tax investigation, M46, M103, M104; so much so that every attorney who represented him advised him to take the Fifth. It is also a fact that these investigations, we now know, were not idle. Eugene had knowledge of facts about his father's creation and maintenance of the Swiss assets, of his own transfer of it and the failure to report income and gains from it to make him criminally liable for evasion or obstruction. And while it is also true that Judge Wood after November 1978 had a continuous order pending against Eugene to disclose, he never specifically addressed the Fifth Amendment claim of privilege or its waiver and Eugene was never specifically sanctioned for failure to make disclosure. The freeze orders were not, essentially, punitive but coercive provisions designed to compel disclosure; or, to insure payment of Capaldi's claim.

Furthermore, there is also, in the court's opinion, a significant difference of constitutional dimension between affirmative imposition of punitive damages and the negative inferences which may as an evidential matter be drawn in a civil case from the taking of the Fifth Amendment. Since such a negative inference has been the subject of a particular demand in this case it deserves analysis.

Because of Eugene's conduct including the taking of the Fifth extending over the years, it is demanded that the court order a forfeiture of his entire interest in both his mother's and father's estate. Eugene inherits an outright gift of 16⅔% of his mother's estate and is an income beneficiary of one-third of this father's estate asserted to have a total value of $30,000,000. I treat this demand here because it appears, essentially, punitive in nature, since the estate has not suffered an actual loss of any such sum. But, the argument is pressed that because Eugene took the Fifth, the court may infer that the estate has, in fact, lost such a sum, *i.e.* that Eugene is hiding as much or more of his parents money in foreign accounts as he would receive under their wills and, therefor, the only effective remedy is to deny him his due in the United States. It is also urged that such a forefeiture continues *in futuro* the "freeze" orders imposed by Judge Wood, *supra* pp. 14-15, result justified by Eugene's non-compliant attitude with regard to disclosure of his personal dealings in foreign assets particularly regarding the Maraflora Foundations

It is, generally, the law in civil cases that courts may draw the most damaging negative inferences from a litigant's refusal to answer questions based on the Fifth Amendment privilege. *Baxter v. Palmigiano,* 425 *U.S.* 308, 96 S.Ct.1551 (1976), *Duratron Corp v. Republic Steyvesant Corp.,* 95 *N.J. Super.* 527, 533 (App. Div. 1967); *National Acceptance Co. of America, supra; SEC v. Musella,* 578 F. Supp. 425, 429-430 (S.D.N.Y. 1984). However, while adverse substantive and procedural consequences may be visited upon a litigant who asserts the Fifth in civil proceedings such as preclusion of the right to testify at trial, suppression of defenses, or entry of judgment against him "on the basis of less persuasive evidence than might otherwise be required," or denial of a

delay in the trial, *Mahne v. Mahne*, 66 *N.J.* 53 (1974), *Costanza v. Costanza*, 66 *N.J. 63* (1974), *Levin v. Levin*, 129 *N.J. Super.* 142 (App. Div. 1974); *National Freight, Inc. v. Ostroff*, 133 *N.J. Super.* 554 (L. Div. 1975); *Whippany Paper Board Co., v. Alfano*, 176 *N.J. Super.* 363 (App. Div. 1980), no Federal or New Jersey case has expresssly held that an award of punitive damages (either in the form of a fixed monetary sum or the declaration of a forfeiture of an entire interest in an estate) is permissible in probate cases involving the assertion of Fifth Amendment privileges in connection with breach of fiduciary duty.

Accordingly, in this case, the court must resort to the test suggested by *Spevack*, *infra*, *i.e.* whether the imposition of the civil punitive damages remedy is too "costly" and would thus, overburden the otherwise free exercise of a litigant's Fifth Amendment right.

There is no question that Eugene's assertion of the Fifth was inextricably tied to and furthered his plan to keep the Swiss assets a secret, which plan might well be described as the wellspring of "evil" in this case. Nonetheless, the court cannot, considering Eugene's use of the Fifth and the other hard evidence marshalled of his personal foreign holdings with which he commingled the Swiss assets, *supra* pp. 31-33 (as to which he still takes the Fifth, Mc44, Tab 17) infer that there exists in some foreign land assets at least equal to or greater than what Eugene is entitled to from the estates here. Such an inference as a springboard for urging forfeiture of Eugene's entire interest in the United States is simply to long a leap from those evidential facts and places to little weight on the legitimate reasons upon which he exercised the privilege. It is, therefore, punitive rather than compensatory in nature. While it is clearly true that Eugene found in the Fifth a respectable cloak to cover the true facts in Switzerland and to avoid further overt perjury, it is also true he was threatened by investigation and possible prosecution for criminal acts, in fact, he arguably committed. For those reasons, the court finds it "costly" in the Spevack sense to declare a forfeiture of Eugene's entire interest in both the Eugene and Olive Mori estates, whether it is considered a punitive measure for failure

to disclose the facts sought by the other parties through orders entered by Judge Wood; or whether, by negative inference flowing from taking the Fifth and the other hard evidence, it is sought to compensate the estates for as yet undisclosed assets.

As to the idea that such a forfeiture is a mere continuation of Judge Wood's freeze orders, it must be candidly admitted that to the extent they were entered eight years ago, *in terrorem*, to compel timely disclosure of needed facts to the end that the estates be promptly wound up, they have failed. Where extreme sanctions imposed on a civil litigant to compel specific directives do not end in compliance, further imposition of the sanction becomes punitive. Cf. *Catena v. Seidl*, 68 *N.J.* 224 (1975), *Napoli v. Eld*, 76 *N.J.* 524 (1978). For these reasons the court deems the far better, and less constitutionally suspect avenue for closing this case is to terminate the freeze orders and impose the traditional remedies of compensatory damages and punitive damages in a fixed amount.

The court does not, then, find it "costly" in the *Spevack* sense to award a finite lump sum punitive damages against a person who so grossly breaches the fundamentals of fiduciary responsibilities as to result in an eleven year delay in winding up an estate as uncomplicated as Olive's even considering the Swiss assets had they been disclosed immediately upon her death. The court simply cannot hold that a person otherwise liable for punitive damages in a civil case should be absolved therefrom because he chooses to implement his self-dealing designs in part by resort to the constitutional privilege against self-incrimination. The court cannot conclude that a civil litigant is thrown on the horns of a dilemma which renders his choice to exercise the constitutional privilege overburdened by the threat of a fixed punitive award for a gross breach of a fiduciary duty regarding specific assets. That holding is clearly distinguishable from the too costly punishment of an open ended forfeiture denying Eugene his interest in any of the income from his father's estate produced by the domestic assets. In this case Eugene hung on to the privilege long after there was ample independent evidence of

his fiduciary breaches and notwithstanding that doing so precluded him from trying to prove a claim to nearly $2 million in assets. Furthermore, Eugene did have, in my view, a real choice at the precise moment he became co-guardian to reveal the entire tale of the Swiss assets. It was remote that upon such a revelation the I.R.S. would have pressed prosecution of either him or his incompetent father upon prompt payment of taxes, interest and penalties. Instead Eugene first chose to hide the facts, then decided to lie about them, breaches sufficient to justify a punitive award, before exercise of the Fifth, technically proper as I assume it was, became the strategy.

In order, therefore, to reflect the seriousness of Eugene's conduct herein; the lies to his sister; the perjured deposition; the several evasive depositions, including the one given in bankruptcy under immunity, the taking and partial use of the Swiss assets for nearly two years as his own without accounting, the exposure of the estate to the risk of higher expenses and loss attendant to delay in settlement; the exaltation of his own claim to the assets knowing the same to be untrue or unprovable; the intent to evade taxes, the court hereby fixes the sum of $1,610,000 as punitive damages, the value of the Swiss assets on the date of Olive Mori's death. The selection of that figure is neither arbitrary nor meant to be poetic or ironic. It was that sum and all its income and gains Eugene intended to horde wrongly for himself. It is, indeed, more than that to which he was entitled had the assets been included originally and ultimately distributed, but, that is the punitive part of this award. It is not merely a disgorgement of illgotten profit. *Myland v. Kirkman*, 204 *N.J. Super.* 345, 381 (Ch. Div. 1985).

While effectively depriving him of his interest in Olive's estate but not nearly his ultimate interest in his father's estate, it represents the deprivation of that of which he intended to deprive those to who it truly belonged and whose interest he swore to protect and serves to deter others who might be tempted to treat so callously the time honored responsibilities of a fiduciary.

In making this award the court has considered certain mitigating factors such as the fact that during Eugene's two year control of the assets they were well invested; that the freeze orders have had an adverse tax impact on Eugene; that by virtue of the recovery of the compensatory damages herein awarded the estate will be made whole; and that upon my judgment in the incompetancy estate Eugene was wholly denied commissions in the sum of $70,000 for the same conduct as found herein. Absent such factors the punitive award might well have been higher. Indeed, at least twice during these proceedings, once at depositions and once during trial the court prohibited questioning of Eugene as to his personal assets, (listed in the 1979 bankruptcy proceedings at $24,000,000, C48), a clear effort by the parties to encourage the court to award a punitive sum measured more by Eugene's personal holdings than his interest in these estates. Once again, for substantially the same reasons set forth above regarding the forfeiture claim, the court rejects a higher punitive award and will deny further post trial discovery of Eugene's personal assets. Accordingly, judgment for the surcharge and punitive damages will enter upon completion of the hearing on counsel fees, *supra* p. 44, for the amount so determined less the $8,000 credit together with the amounts stated in the other categories listed on p. 36. In addition Mr. Capaldi shall recalculate the interest on the said expenses from the various dates expended to January 12, 1987 at the annual rates set forth in C73 (without, of course, the credits) which the court hereby determines to be reasonable. The calculation shall be certified and circulated to all counsel. Mr. Cooper shall prepare and submit the form of judgment.

The awards of compensatory and punitive damages herein made shall be recovered first from any balance due Eugene from his mother's estate presently held under the freeze orders or to become due as the result of termination of the freeze order together with interest; second, from any balance due Eugene from the accumulation and interest thereon resulting from the freeze order in the Eugene Mori Estate and thirdly from any and all accumulation to date or to become due from the trust created by Mr. Mori's will of

which Eugene is an income beneficiary, all until such time as the compensatory award is first paid with interest and then the punitive award is paid. The punitive award shall not run at interest.

In the event, notwithstanding the above, Eugene dies prior to the full recovery of these awards, it is the court's order that the balance due become a claim against his probate estate and to that end any fiduciary then acting shall have sufficient authority to enforce recovery of such balance in whatever foreign court or court of a sister state this judgment may be presented.

THE CLAIMS AGAINST CAPALDI

The claims against Mr. Capaldi by Eugene sound in various breaches of fiduciary duty causing, primarily, delay in winding-up the estate. The court has combed the record for evidence of these charges and finds absolutely none. In my view, under very trying circumstances, Mr. Capaldi with unflagging honesty and meticulous attention to detail tried everything he could to wind-up Olive's estate as quickly as possible consistently with reasonable fiduciary practice and in consideration of the several tax problems.

The claim against Capaldi by McCrane need not be addressed since it is plain the claim was asserted only for the purpose of protecting her interests in the event Eugene prevailed on some theory caused by Capaldi's fault. As the court understands it, the claim was thus entirely one for indemnification. Since the court has now determined Eugene's full liability there is no basis for shifting any part thereof to Mr. Capaldi. While his early views with regard to the Morgenstern theory may have added some weight to it, Mr. Capaldi realized that both the court and I.R.S. would

have to accept it. It is therefor clear that the matter would have had to be litigated in any event and Capaldi's position neither contributed to additional delay or increased expense in so doing. Nor, in my opinion, was the Morgenstern theory so devoid of accounting or tax logic as to suggest that its mere presentation to I.R.S. or the court would constitute a breach of fiduciary duty.

For the above reasons all claims against Mr. Capaldi are dismissed with prejudice.

APPENDIX B

B-1

SUPERIOR COURT OF NEW JERSEY

[SEAL]

CHAMBERS OF
HAROLD B. WELLS, III
JUDGE

BURLINGTON COUNTY COURT FACILITY
MOUNT HOLLY, NEW JERSEY 08060

April 24, 1987

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RE: In the Matter of the Estate of Olive Mori, Deceased
75-1029

Dear Counsel:

Attached hereto and made a part hereof find my Opinion, dated April 24, 1987, in the above referenced matter.

Yours very truly,

HAROLD B. WELLS, III, J.S.C.

HEW,III/bgt

cc: Zink, Brown, Baumgartner & Cutts
Stryker, Tams & Dill

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

This opinion decides: (1) certain issues raised by a letter from McCarter and English dated December 16, 1986 seeking clarification of my opinion of November 21, 1986 (hereinafter Opinion); (2) certain motions, also asking the court to amplify or clarify that opinion; (3) the question of the allocation of pre-June 1983 counsel fees and costs to surcharge recoverable from Eugene Mori for breach of fiduciary duty and reasonableness and allocation of such fees and costs after June 1983; and (4) the award and allocation of accountant's fees and costs. The last two questions were the subject of a plenary hearing ordered by the Opinion which has now been completed. Decision on all these questions will result in the entry of a final judgment against Mr. Mori.

(1) THE McCARTER & ENGLISH LETTER OF DECEMBER 16, 1986

The referenced letter requests the court consider certain aspects of the Opinion essentially for purposes of clarification. As a result of such consideration the court finds as follows:

(a) The Opinion should have listed the firms of Horn, Kaplan, Goldberg, Gorny & Daniels (Mr. William Konan, appearing) and David M. Dugan,III as having appeared in the case. The omission was inadvertent.

(b) On page 42 of the Opinion the word "not" should be inserted between *had* and *set* in the penultimate line of the second paragraph.

(c) The last sentence in the first full paragraph on page 24 of the Opinion should read:

> It is this pleading, *amended in January 1985*, with Capaldi's Chancery action (dismissed without prejudice for want of prosecution, *R.*1:13-7, Mc18, Mc19, Mc20) and his bankruptcy claim *together with exceptions filed in both this estate and the incompetency,*

which forms the focal point of the present case. [emphasis represents additional language]

(d) On page 48 of the Opinion a footnote should be appended to the figure $30,000,000. That footnote is:

> As is now shown in the Sixth and Final Account of the Administrator Pendente Lite of the Estate of Eugene Mori, the estate actually aggregated over $40,000,000. However expenses and taxes reduced this figure to about $10,000,000. A Trust Officer of the Fidelity Union Bank succeeding as Trustee under the Will fixed each of the residuary trusts (one of which Eugene is income beneficiary) at about $3.7 million generating income of about $200,000 per year.

(e) Generally, unless the context otherwise dictates the court uses the term "Swiss assets" to mean whatever assets the elder Mori transferred known or unknown and not just the $1.6 million ultimately revealed in the Swiss Credit Bank. A better term might have been "Additional Foreign Assets" as that expression is defined in C45, paragraph E.

Should appeal be taken from the court's judgment entered hereinafter this letter shall be deemed an integral part of the Opinion. *R.*1:7-4, *R.*1:7-5.

(2) THE MOTIONS

The court said on page 54 of its Opinion:

> Accordingly, judgment for the surcharge and punitive damages will enter upon completion of the hearing on counsel fees *supra* p.44, for the amount so determined less the $8,000 credit together with the amounts stated in the other categories listed on p.36.

The court is asked to resolve "the manner in which the compensatory and punitive awards against Eugene E. Mori

should be collected from Eugene's share of the Olive E. Mori Estate . . ." McCarter & English Brief, January 6, 1987, p.1. The request is made as a result of the fact that Eugene is a one-sixth beneficiary under his mother's will.

The compensatory award and the interest thereon is a surcharge resulting from Eugene's misconduct the objective of which is to reimburse the estate, which is the payee of the award, for expenses, as to which it has been or will be the power. The judgment shall, therefor, be in the full amount, which upon actual recovery, the Executor shall reimburse to Eugene in respect to his one-sixth share in the estate at the time of the Third Account. The requirement of full recovery applies particularly to the counsel fees and costs as determined in this letter, since as to the post-June 1983 period they must now be actually paid. Because of entirely proper distributions to the beneficiaries upon prior accounts there may not be sufficient assets in the estate to pay the post-June 1983 counsel fees and costs as ordered herein. Ordinarily, this would require the executor to demand pro-rata refunds from the beneficiaries. See N.J.S.A. 3B:23-41. Upon recovery of these expenses the beneficiaries (including Eugene) would, of course, be entitled to a restoration of money they refunded at the Executor's demand. In this instance, the Executor need not engage in this round-robin procedure. The entire amounts herein allowed of heretofore unpaid counsel fees and costs shall be withdrawn from Eugene's frozen interests in the estates and "trusts" as set forth on page 55 of the opinion and paid. This procedure is entirely fair to Eugene since the net cost to him is effectively reduced by the amount he would have received as his share.

Finally, it was clearly my intent that all the compensatory surcharges, including counsel fees, bear both pre-judgment interest calculated at the C73 rates from the date of payment to the entry of Judgment and, where unpaid, post-judgment interest in accord with *R.*4:42-11(a).

Punitive damages are to be recovered in full by the estate in the manner directed by the Opinion. The punitive and deterrent effect of this award, however, is not to be blunted

by allocation to Eugene in respect to his one-sixth interest in the estate. Furthermore, I have reconsidered the matter of interest on this award in light of the briefs submitted both as to the legal issue and the practical effect. The court believed *Bolinski v. Goodman*, 129 *N.J. Super.* 351, 360 (App. Div. 1976) extended to post-judgment interest. In that I was mistaken. The case is clearly restricted to pre-judgment interest. Denial of post-judgment interest is the exception not the rule and there is no reason for such an exception here. The present value of an award of damages is effectively reduced by a failure to award interest, a result the court did not intend. Accordingly, the judgment for punitive damages will bear interest under *R.* 4:42-11(a). *Bd. of Educ., City of Newark v. Levitt*, 197 *N.J. Super.* 239, 244-245 (App. Div. 1984).

Finally the court ruled as to the manner of recovery from Eugene, p.55:

> The awards of compensatory and punitive damages herein made shall be recovered first from any balance due Eugene from his mother's estate presently held under the freeze orders or to become due as the result of termination of the freeze order together with interest; second, from any balance due Eugene from the accumulation and interest thereon resulting from the freeze order in the Eugene Mori Estate and thirdly from any and all accumulation to date or to become due from the trust created by Mr. Mori's will of which Eugene is an income beneficiary, all until such time as the compensatory award is first paid with interest and then the punitive award is paid.

The court did not, by setting forth priorities as to the sources of recovery of the judgment, intend to deny the ordinary and usual lien offset of a judgment of record on the assets of a judgment debtor wherever they may be found. The intent was to postpone execution against Mori's non-probate and/or trust interests until his interests in these estates and his trust have been exhausted. Cf. *N.J.S.A.* 2A:17-

57; *Raniere v. I&M Investments Inc.*, 139 *N.J. Super.* 329 (Ch. Div. 1978), *aff'd per curiam*, 172 *N.J. Super.* 206 (App. Div. 1980). The latter are, of course, subject to execution and garnishment. *N.J.S.A.* 2A:17-57.

Furthermore, the judgment is intended to have extra-territorial effect under the principles of full-faith and credit and comity. Transfers of assets for less than fair consideration or under circumstances suggestive of fraud may be attacked in this state or any other in which the judgment may have, by proper local procedure, been made binding against assets situate therein.

(3) COUNSEL FEES

The hearing recently concluded established the counsel fee claims and proposed allocations to Eugene as displayed in Appendix IA, Columns 2 and 5 and notes thereto. The accounting firm of Capaldi, Schalick and Reynolds also proposed an allocation of its award on the second account and, in addition, it presented a new claim. That is shown in Appendix IB. Opinion, p.44. *In re Trust of Brown*, 213 *N.J. Super.* 489, 494 (L. Div. 1986). The cost claims are displayed in Column 4.

The court chooses to analyze the several issues raised during the hearing as to each firm as to fees separately. It will then proceed to determine costs and the accountant's claim. Before doing so, however, it is appropriate to review several general points. The underlying theory of an award of counsel fees against Eugene is that the matter involves a fund in Court *R.* 4:42-9(2), to wit: the whole of the Olive Mori estate. Here the award of counsel fees and costs against Eugene is in the nature of a surcharge against a miscreant fiduciary (both during and after his formal service as such) with regard to that fund. The objective, of course, of such an award is to make the fund entirely whole. Eugene's conduct almost resulted in the loss to the estate of $1.6 million but for the extraordinary legal services evidenced in the affidavits of services and at the hearing to restore and

maintain that fund. As to the fees and costs incurred after June 1983, all of which are presently unpaid, the theory is no different. While it is true, no accounting of the estate is before me (the usual procedural context for allowance of fees in probate) *Cf.* 7 *N.J. Practice, (Clapp, Wills and Administration)* (3 ed. rev. 1982) Section 1546, the court will treat the applications for those fees as though presented upon the third account for allowance. Thus the usual standards for adjudging counsel fees, *Brown, supra, Singer v. State,* 95 *N.J.* 457 (1984), including the lodestars of hourly rate and hours devoted and other factors increasing or decreasing the fee will guide the court. Accordingly, counsel fees or costs will not be allocated to Eugene which would not be reasonable as a fee or costs allowable in an estate of this size and complexity which has become embroiled in a long lawsuit. In the case of the fees and costs allowed by Judge Wood in his Judgments on First and Second Accounts and by the Appellate Division on the appeal, the question of reasonableness is answered by those judgments leaving only the allocation of the time for services as reported to Eugene's conduct. Opinion, p.43-44.

At the hearing Eugene raised the general issue of whether his misconduct "caused" the need for the extraordinary expenditure of time evidenced by the affidavits of services. The argument postulated the creation of the Swiss fund by Mr. Nori, Senior, and asked the court to infer that (a) serious family disputes over claims to them even upon full disclosure, (b) tax issues and (3) other issues, would have resulted in sizable counsel fees in any event. Counsel's cross-examination sought to elicit the course of the matter in various hypothetical situations most of which the court disallowed as calling for speculation. Upon further reflection, I am satisfied of the correctness of that ruling. *Evid. R.*4. Complete disclosure of all the facts known to Eugene in March 1974 and production of the Swiss Credit Bank records of the account from its opening would have, in my view, virtually eliminated most, if not all, of the several problems faced by the three estates respecting the Swiss assets. It lies ill in the mouth of Eugene, whose behavior fell so far below acceptable norms of fiduciary conduct, to assert that the rest of the family was

so disputatious anyway as to result in expensive litigation. On the contrary, even as it was the family (with the exception of Eugene), upon good advice, was able to settle potential diffferences over the assets in the Fall of 1978, a little over a year after their revelation. C45, C46. I will now analyze each counsel fee claim and its allocation thereof.

HORN, KAPLAN, GOLDBERG, GORNY & DANIELS

The award and allocation of fees for Horn, Kaplan, Goldberg, Gorny & Daniels were the subject of a settlement among the parties. The figures in Appendix IA, lines 2, 11 and 17 under Column 6 embody this settlement which the court has reviewed and found reasonable. The court's determination of costs is found in Column 7. The settlement of this aspect of the case has had no impact on the court's reasoning with regard either to the issues or reasonableness of the fees of other counsel or the allocation of such fees to Eugene. In fact, the decisions herein were largely made before the court was appraised of the settlement.

DAVID H. DUGAN, III

Mr. Dugan represented the four children of Joan McCrane, all of whom are remainderman of trusts created by the Will of their grandfather. His first engagement with any of the Mori matters began in the estate of Eugene Mori and it was in that estate he signed the Family Settlement Agreement on their behalf at the end of 1978.

As to the Olive Mori estate his involvement began in December 1979 and continued thereafter through both accountings and during pursuit of the claims against Eugene. He testified, and his affidavits support it, that his services were all directly or indirectly related to the Swiss assets, which under the estate settlement agreement were attributed to and, thereafter, dominated the Olive Mori estate. For instance, with his initial entry into the case he prodded Mr.

Capaldi to file an account and make partial distribution to his clients despite Capaldi's understandable reluctance to do so with Eugene's false ownership claim still open. See Opinion, p. 17. Accordingly, he proposes to allocate all his fees and costs to Eugene's misconduct. The court finds that allocation proper.

In the first two accounts Judge Wood allowed hourly rates of $90 and $115 respectively. In the present proceeding Mr. Dugan seeks allowance of $115 per hour for 4.3 hours and $125 per hour for 70.10 hours. See Appendix I, Line 16. Mr. Dugan's representation may best be characterized as "watchdog" in nature. While he filed pleadings and otherwise positioned his clients and prepared himself for their maximum protection he did not actively participate in the trial herein. He did, however, consult with the other attorneys and prepared a trial exhibit, C57. For those reasons the court finds $115 per hour reasonable for Mr. Dugan's services and will allow a fee of $8,500, all of which shall be allocated to Eugene.

COOPER, PERSKIE, APRIL, NIEDELMAN, WAGENHEIM & WEISS

The fee request of the law firm of Cooper, Perskie, April, Niedelman, Wagenheim & Weiss must be analyzed in separate categories: (1) the proposed allocations to Eugene of services on the First Account (Appendix I, Line 4); (2) the fees allowed on the Second Account and, in addition, those presently sought for the first time for services rendered in the prior accounting periods and the allocation thereof (Appendix I, Line 5, 6, 9, 12 and 13) and; (3) the fees presently sought for the period since June 1983. (Appendix I, Line 18). The request and proposed allocation was supported, in addition to the affidavits submitted on the First and Second Accounts, by the following affidavits:

(a) Mr. Perskie, dated 9/5/86, 4 pages

(b) Mr. Perskie, dated 12/23/86, 114 pages

(c) Mr. Perskie, (Corrective Affidavit) dated 2/25/87, 5 pages

(d) Mr. Wolfe, (Supplemental Affidavit) dated 1/20/87, 9 pages

(e) Mr. Wolfe, (Second Supplemental Affidavit) dated 3/6/87, 4 pages

(f) Mr. Cummis, dated 2/23/87

and by the testimony of Messrs. Perskie, Cooper, Wolfe and Capaldi.

(1) The court is satisfied from all the evidence adduced that the proposed allocation to Eugene of fees for services in the period covered by the First Account should be approved. This allocation calls for 80% of those services totaling $25,000, be attributed to Eugene. The services not allocated to Eugene are those usual and reasonable for an estate of this size and complexity. About one half of the services included in the amounts alloted to Eugene are the firm's services in the bankruptcy proceeding. See Perskie Affidavit of Services, First Account dated April 20, 1980. Eugene argues that the estate, while named as a creditor in the bankruptcy, should have, as did another creditor, asked for leave to pursue its claim in the state courts. The argument raises an issue of professional judgment in representing a fiduciary which the court will not second guess in the absence of a showing of abuse of discretion. Clearly, there were substantial reasons for pursuing the estate's claim in bankruptcy not the least of which was the opportunity to question Eugene under immunity about the Swiss assets. This might not have been possible in the state courts. His deposition in the bankruptcy eventually became Exhibits Me43 and C92, Tab E, at the trial herein. The proposed allocation is allowed.

(2) The firm, conceding inadvertence in failing to apply for certain fees at the time of prior accounts now seeks, in addition to allocating that actually allowed by Judgment on the Second Account, dated May 31, 1983, C69, ($20,000, Appendix I, line 12) an original award and allocation of the

sum of $18,943 for services rendered prior thereto. Appendix 1A, Column 2, lines 5, 6, 9 and 13; see (c) above.

Lines 5 and 6 represent services rendered before or just after the Judgment on the First Account, dated August 5, 1980. C60. They should have been considered either on the First Account or on the Second Account. The court will not allow fees for services rendered in periods prior to the filing of the Second Account which should have been considered at that time. *Cf. In re Dorrance*,5 *N.J. Super.* 236 (App. Div. 1949). Nor can this court make an original award of fees for services incident to an appeal. *R.* 2:11-4; Appendix 1A, line 9. Those requests will be disallowed.

Lines 12 and 13 of the Appendix will be considered together, a total claim of $28,879. Column 2. Line 12 represents the fee and services actually considered and allowed by Judge Wood. Line 13 represents a first time request for services rendered after the filing of the Second Account in June 1982 but before its allowance on May 31, 1983, a year later. C69. The firm failed to supplement its request to Judge Wood prior to his allowance of the Second Account. I have gleaned the figures in Line 13, from pages 21-33 of Mr. Perskie's Affidavit of December 23, 1986, ending with the court appearance on May 15, 1983. There are 71.03 hours noted to that point which at Mr. Perskie's rate of $125 per hour amounts to a fee of $8,879. In my opinion since these services were rendered after the filing of the Second Account they could be properly considered on the Third Account. They are, then, subject to the court's consideration here both as an original award and for allocation to Eugene based on my reasoning expressed above.

In his original affidavit on the Second Account, dated June 9, 1982 (paragraph 8), his affidavit of December 23, 1986 (paragraph 12) and in his testimony, Mr. Perskie estimated that during the entire period in question, August 1980 to May 1983, about 35 hours was spent on routine estate work not attributable to Eugene's misconduct. He therefor proposed to charge Eugene $16,500 of the $20,000 allowed

by Judge Wood, Line 12, leaving $3,500 (35 hours x $100 per hour) payable by the estate without reimbursement.

The court has carefully considered the matter. Though allowed by Judge Wood the 247 hours served by the firm represent 192 hours of undocumented weekly discussions between Mr. Perskie and Mr. Capaldi over a 22 month period between August 1980 and May 1982. Affidavit, June 9, 1982, paragraph 4. It is asserted these discussions generally concerned progress or lack of it in pursuing Eugene for information about the Swiss assets. The court has reviewed the trial exhibits dated during this period and finds a high probability that the Swiss asset difficulties dominated the period. This being the case the court will allocate the entirety of line 12 to Eugene.

It is out of line 13, beginning with the preparation and filing of the account, that I will take the 35 hours estimated by Mr. Perskie, at his rate of $125, however, which is hereby approved for all of his services in this more than ordinary case. *Brown, supra.* The remainder of the services are clearly attributable to Eugene. For instance, he filed a purported account, Opinion p. 20, and supplied certain records to Capaldi, Opinion p. 21, for which a protective order was negotiated and signed. Accordingly, the allocation is fixed. Column 6, lines 12 and 13.

(3) Line 18, Column 2 represents the firm's request for services since June 1983. The footnote opposite the Column 2 figure itemizes its source and breakdown. In accord with *Brown, supra* the firm has submitted an affidavit of Clive Cummis, an attorney with state wide experience with particular knowledge of Atlantic County (where Cooper, Perskie's principle office is situated) by which he asserts the reasonableness of the hourly rates charged by each attorney in the firm who worked on the estate. Those rates are:

Mr. Perskie	$125
Mr. Cooper	$175
Mr. Wolfe	$100
Mr. Quinn	$ 75
Mr. Chandler	$150
Mr. Salad	$100
Mr. Wagenheim	$175

In addition to the Cummis' Affidavit the court has considered the testimony of Mr. Capaldi on the subject, the experience of counsel and the other factors mentioned in *Brown* and *Singer*.

The above attorneys, with two others (Kovacs at $75 per hour and Smith at $75 per hour) provided 2,014.81 hours of service and request a fee of $237,976.158. Not included therein as well is 152.54 hours provided by paralegals at $35 per hour or a total of $5,338.90.

The work of associates, Chandler, Wagenheim, entirely, and Salad, in large part, was spent on developing a request to I.R.S. for a private ruling on the Morgenstern theory. See Opinion, p. 26. It is asserted that a total of 76 hours was spent on this project. But the court has reallocated 5 hours of Salad's time on pp. 49 and 50 of Perskie's December 23, 1986 affidavit of services to the tax ruling file, pp. 41-48. This increases the latter to 81 hours and decreases the Complaint for Instructions file to 1,661 hours. The ruling was largely directed at securing a substantial benefit for Eugene. The I.R.S. declined to rule and ultimately the theory upon which it was based was rejected by this court, but Eugene can hardly complain that the fees be visited upon him. Services of this general nature were allowed at a rate of between $115 and $120 per hour in the Eugene Mori Estate to non-Burlington County firms who did tax work (Duane, Morris and Hecksher) in that estate. The parallel to the services on the tax ruling here is compelling. The court, therefore, will allow the requested fees, and they may be allocated to Eugene.

The services of the other attorneys, including those of Mr. Perskie in the period after June 1983, are allowed as reasonable considering the results achieved, and the skill required and displayed. The hourly rate charged for Mr. Cooper is not unreasonable for trial work and preparation considering the exclusivity it demands to one client at the expense of others and the complexity of this case. The majority of his time was spent in court during a seven week trial. Nor was the work of Mr. Wolfe, who assisted him and

Mr. Poppinga during the trial, an unreasonable or unnecessary luxury. The depositions and discovery material in the case was voluminous covering as it did nearly a decade of material and several lawsuits. Wolfe, became a veritable catalogue of this material and was able to retrieve it without the need to recess to find it. All of this was in addition to his substantial professional assistance to Mr. Cooper. However, the court must, being persuaded by the reasoning of *Brown, supra* disallow the $5,338.90 in fees sought for paralegals. Accordingly, the court will allow a total of $232,637.25 for 1861 hours of services at the rates described above all allocated to Eugene. The fees sought are entirely reasonable, especially when measured against that allowed the *Zink* firm on the Sixth Account in the Eugene Mori estate. The costs as awarded, *infra*, p. 12, are allocated to Eugene.

McCARTER & ENGLISH

The requests of McCarter and English may be analyzed in two segments: (1) the proposed allocation of Lines 7, 8 and 14, and (2) the allowance and allocation of Line 19.

(1) The firm proposes to allocate $14,300 (of which $3,300 represents Mr. Miller's services, 75% of his total bill) of a total bill of $25,000 to Eugene on the First Account. Appendix I, Line 7. They propose to allocate 100% of the fees allowed on the appeal and $21,609 of the fees on the Second Account to Eugene. The figures were established by a review of the time records and supported at the hearing through the testimony of Mr. Julius Poppinga, the attorney assigned to this matter throughout. The court is entirely satisfied that these proposed allocations are fair, even though as to the First Account somewhat more ($1,500) was allocated than contemporaneously reported to the Executor in October 1980. The proposed allocations are hereby fixed.

(2) As in the case of the Cooper firm, McCarter and English supported its request for allowances in the current period by the affidavit of an attorney, Howard G. Wachenfeld, who certifies to his knowledge of the hourly rates charged by

attorneys practicing in Essex County, the principal home of McCarter & English.

Julius Poppinga, (after 1/1/82).	$163
Julius Poppinga, (after 1/1/84).	$200
John Drosdick, (after 1/1/82)...	$110
John Drosdick, (after 1/1/85)...	$116
John Drosdick, (after 4/1/86)...	$125

The above rates, while higher than the Cooper firm are not unreasonable. The difference is not substantial and clearly is a reflection of the difference in locality. Nor are they unreasonable in light of *Brown* or *Singer, supra* in a case where the services were devoted to the successful litigation of a claim that will exceed $2.0 million. The proposed allocations are fixed.

COSTS

As to the costs awarded by the previous Judgments or the Appellate Division the same will be allocated to Eugene by the same percent as counsel fees allocated to him bear to total fees. There is no fairer basis for doing otherwise since an individual items of cost can not be found to have been incurred for ordinary estate expense where the fee itself was not so allocated. The results of this allocation are found in Column 7.

With regard to the costs sought for the first time Appendices II and III set forth the itemized applications of the Cooper and McCarter firms respectively.

R. 4:42-8(a) begins with the idea that "costs shall be allowed as of course to the prevailing party." That sweeping generalization, however, is modified by review of the long tradition in New Jersey of limiting costs to those taxable by the clerk. See *N.J.S.A.* 22A:2-1 *et seq.* The view that private litigants should bear the brunt of their own counsel fees has also influenced the imposition of costs. *Sunset Beach Amusement Corp. v. Belk,* 33 *N.J.* 162 (1960) *Alexander's*

Dept Stores of N.J. Inc. v. Arnold Constable Corp., 105 *N.J. Super.* 14 (Ch. 1949). That view prevails as well in probate actions. 7 *N.J. Practice, (Clapp, Wills and Administration)* (3 ed. rev. 1982) Sections 1541, and 1542; *In re Caruso,* 18 *N.J.* 26 (1955). Taxed costs are extremely modest being limited generally to court filing fees, sheriff's service fees, certain statutory witness fees and other like sums. *N.J.S.A.* 22A:2-8, 9 and 10; *Melton v. Prudential Prop & Cas. Ins. Co.*, 205 *N.J. Super.* 196 (App. Div. 1985). While the statute *N.J.S.A.* 22A:2-8 ends with the phrase that a party is entitled to include in his bill of costs "such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law, or rule of court," no decided case has ever used that language as a springboard to expand generally the allowable expenses to the kinds of items described in the appendices.

Nonetheless, the court is not unmindful of current billing practices of law firms which separately itemize and charge the client for certain expenses readily identifiable to his case. Should the court allow such expenses and allocate them to Eugene? As already stated the brunt of the expense of this litigation is being visited upon Eugene by virtue of his gross misconduct as a fiduciary respecting a fund in court. [1] The traditional reason for not awarding costs has, therefore, no applicability. But there is another reason the court must decline to award certain of the requested items. Reasoning from the premise in *Brown, supra* 493 and 509, that the cost of services for paraprofessionals is overhead, so likewise does the court here find most of these expenses. They cannot be the basis of an independent award since it must be presumed the fee allowed counsel covers overhead and a separate charge entails a second recovery.

For the reasons stated all the expenses listed in the Cooper, Perskie, April, Niedelman, Wagenheim & Weiss affidavit are disallowed except those paid to the Surrogate, $521.; and to Certified Court Reporting Services for deposition expenses, $273. *Finch Pruyn and Co., Inc. v. Martinelli,* 105 *N.J. Super.* 156 (Ch. Div. 1969); *Huber v. Zoning Board of Adj. Howell Twp.*, 124 *N.J. Super.* 26 (Law Div. 1973).

Likewise similar expenses are denied McCarter and English. except the expert witness fees $12,693.51 and $325, *In re Caruso, supra; Bungs Bar & Grille, Inc. v. Florence Twp.*, 206 *N.J. Super.* 432, 478-481 (L. Div. 1985); deposition transcripts, $1,445.75 and filing fees, $184 and $756.

All of the allowed expenses totalling $14,752.51 shall be allocated to Mr. Mori. The results of this allocation are found in Column 7, lines 18 and 19.

ACCOUNTING FEES AND COSTS

On the Second Account, C69, the Capaldi accounting firm, Capaldi, Schalick and Reynolds, was allowed $12,875 for professional fees. These services were supported at the hearing by two invoices, Court's Exhibits 1 and 2 which Capaldi sought to allocate 100% to Eugene. Review of the invoices and consideration of Mr. Capaldi's testimony leads the court to conclude that the suggested allocation is proper. Mr. Capaldi has also submitted a new affidavit of services and costs for allowance and allocation against Eugene in this proceeding. See Opinion, p.43. He seeks $2,450 for services, all for the preparation of Federal and State Fiduciary Tax Returns for the years 1982-1985 and representing the Estate in an I.R.S. tax examination of its 1981 return. The balance of his claim, $2,426, is for telephone calls, photocopying, postage and travel expenses incident to his duties as Executor caused largely by the need to participate fully in this litigation.

The court concludes that the fees for services are properly allocatable to Eugene. The services were occasioned by the Swiss assets full disclosure of which in 1975 or 1976 would have resulted in earlier distribution thereof obviating the need for later tax returns. As it was the whole matter became so bogged down by Eugene's bogus efforts to claim them that returns for the years in question became necessary.

As to Mr. Capaldi's claim for costs, it must share the same fate as similarily described costs sought by counsel. See *infra*, p.12.

SUMMARY

The opinion, page 54, found Eugene Mori potentially liable for $293,713 (see p. 36) in expenses together with prejudgment interest thereon calculated at the rates indicated in C73. That figure included $139,935 in counsel fees and costs allowed on the First and Second Accounts and by the Appellate Division. It also includes $12,875 allowed the accountant. As a result of the hearing, now completed, a final allocation to Mori has been made of the previous awards and awards and allocations of the post-June 1983 fees and costs have now been made.

Accordingly, to the amounts other than fees and costs found on page 36, $140,903, must be added allocations of counsel fees, costs and accountants' fees in the sum of $608,265 or a total award of $749,168. Prejudgment interest shall run on the items in lines 1-15 and 20 Column 8 (except line 13) at the rates provided by C73 as calculated by Mr. Capaldi from date of payment. No prejudgment interest shall be allowed on the items in lines 16-19 and 21, Column 8; but, the court directs that the sums awarded be recovered and paid to counsel and the accountants as soon as practical after the entry of judgment from the sources described on page 55. Mr. Cooper shall submit the form of Judgment.

Yours very truly,

Harold B. Wells, III, J.S.C.

HBW/bgt

Dated: 4/24/87

APPENDIX C

C-1

FINAL JUDGMENT

SUPERIOR COURT OF NEW JERSEY

[SEAL]

CHAMBERS OF
HAROLD B. WELLS, III
JUDGE

BURLINGTON COUNTY COURT FACILITY
MOUNT HOLLY, NEW JERSEY 08060

May 18, 1987

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GOLDBERG, GORNY
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Re: In the Matter of the Estate of Olive Mori, Dec'd
75-1029

Dear Counsel:

The court has this date executed for form of Judgment submitted by Mr. Wolfe's letter of May 7, 1987. In so doing I have attached thereto "Schedule A," provided under cover of Mr. Wolfe's letter of May 4, 1987.

There are several additions and deletions to the Judgment which merit explanation:

(1) in paragraphs 1 and 2, I have added words to make it explicit that the court intends an *in personam* money judgment against Mr. Mori. See April 24, 1987 Opinion Letter, page 4;

(2) in paragraph 6, I have stricken all the language after the word "vacated." The stricken language is inconsistent with the November 21, 1986 Opinion, page 51;

(3) in paragraph 7, I have stricken certain language and added the words "permitted by the court." In this connection the court has also this day executed writs of execution for levying on Mr. Mori's interests in the estate and trust. Such is entirely consistent with the April 24, 1986 Opinion, page 4.

I have also been presented with an Order for Discovery which I will not sign at this time. In the first place such a discovery order is inconsistent with the November 21, 1987 Opinion, page 54. Secondly, such an order, in any event, is premature until it is known exactly what part of the awards are recovered through the estates and trust. Thirdly, the court, mindful that prejudice to the estate is minimized as the result of post-judgment interest, wishes to permit Mr. Mori a reasonable time to comply voluntarily with the court's judgment. It would be clearly to his advantage to do so. Finally, since recovery of the awards are reasonably secured through his trust, before general discovery of and/or levy upon or sale of other of Mr. Mori's assets is permitted the court would wish to evaluate all the relevant facts and

circumstances at such time as the issues are more precisely framed.

Thank you very much.

Yours very truly,

HAROLD B. WELLS, III, J.S.C.

HBW, III/bgt

cc: Zink, Brown, Baumgartner & Cutts
Stryker, Tams & Dill

C-4

File #18,697-13

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Attorneys for

BERNARD W. CAPALDI,

Executor

IN THE MATTER OF THE ESTATE OF OLIVE E. MORI, DECEASED	SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY LAW DIVISION—PROBATE PART DOCKET NO. 75-1029
IN THE MATTER OF EUGENE MORI, AN INCOMPETENT	SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY CHANCERY DIVISION DOCKET NO. C-2560-73
IN THE MATTER OF THE ESTATE OF EUGENE MORI, DECEASED	SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY LAW DIVISION—PROBATE PART DOCKET NO. 75-1298 Civil Action

JUDGMENT

The captioned matters, having been consolidated *sua sponte* for the limited purpose of recovering and collecting the surcharge and assessment against Eugene E. Mori, as set forth below; and the Court having considered all matters and causes of action arising out of, (1) the Complaint, as amended, of Bernard W. Capaldi, as Executor in Docket No. 75-1029; (2) the failure of Eugene E. Mori properly to account, either as Co-Executor in Docket No. 75-1029, or as guardian in Docket No. C-2560-73; (3) the failure to Eugene E. Mori to make discovery pursuant to Orders of the Court in Docket Nos. 75-1029 and 75-1298; and (4) the exceptions filed in Docket Nos. 75-1029 and C-2560-73; and the Court, sitting without a jury, having heard these matters commencing on January 27, 1986 and ending on March 18, 1986; and the Court having further heard certain ancillary proceedings on the dates of January 21, 1987, January 22, 1987, February 18, 1987, February 19, 1987 and February 26, 1987; and the firm of Cooper Perskie April Niedelman Wagenheim & Weiss, P.A. (by James L. Cooper and Kenneth D. Wolfe) appearing on behalf of Bernard W. Capaldi, Executor of the Estate of Olive E. Mori, Deceased; and the firm of McCarter & English (by Julius B. Poppinga) appearing on behalf of Joan M. McCrane, Individually, and Joan M. McCrane, A. Arthur Miller and Julius B. Poppinga as trustees ("Trustees"); and Seymour Wasserstrum, Esquire appearing on behalf of Eugene E. Mori; and the firm of Horn Kaplan Goldberg Gorny & Daniels (by William M. Honan) appearing on behalf of Janice Vondra; and David H. Dugan, III, Esquire appearing on behalf of the children of Joan McCrane; and Parker McCay & Criscuolo (by Marc M. Baldwin) appearing on behalf of the Executor, Bernard W. Capaldi on the Counterclaims of Joan M. McCrane, the Trustees, and the children of Joan M. McCrane; and the Court having considered the evidence and arguments of counsel in respect of the foregoing proceedings; and the Court having found that Eugene E. Mori committed serious misconduct as a fiduciary (all as more particularly set forth in the Opinions ("Opinions") dated, respectively, November 21, 1986 and April 24, 1987) and that accordingly

Eugene E. Mori is liable for compensatory and punitive damages as hereinafter set forth;

IT IS, on this day of May, 1987, ORDERED AND ADJUDGED as follows:

1. That Eugene E. Mori be and he is hereby surcharged and Judgment entered against him for the reasonable and necessary expenses incurred in connection with the Estate of Olive E. Mori, Deceased, arising out of, among other things, Eugene E. Mori's failure to disclose matters materially affecting said Estate, his failure to keep trust funds separate, and his failure to account, such expenses as to include counsel fees related to the investigation for and recovery of the Swiss Assets, as described in the Opinions, and for accounting and other expenses which the unlawful conduct of Eugene E. Mori caused the Estate to incur, in the amount of $749,168.00; together with pre-judgment interest as set forth on Schedule A appended hereto in the amount of $244,570.00 as of April 30, 1987, for a total of $993,738.00 as of April 30, 1987, together with further pre-judgment interest from May 1, 1987 to the date of entry of this Judgment at the rate of $125.00 per diem and with post-judgment interest from and after said date of entry in accordance with *R.* 4:42-11(a);

2. That Judgment be and hereby is entered against Eugene E. Mori in the amount of $1,610,000.00 as punitive damages together with post-judgment interest on said amount in accordance with *R.* 4:42-11(a), the aforesaid amount and interest to be recovered by the Executor of the Estate of Olive E. Mori for and on behalf of the beneficiaries (other than Eugene E. Mori) of said Estate as their interests may be determined;

3. That the Executor of the Estate of Olive E. Mori, Deceased, shall pay to the parties set forth in Paragraph 5 below the sums set forth in Subparagraph (i) through (v) of said paragraph, respectively, and shall thereafter distribute the balance of the surcharge and interest provided for in Paragraph 1 above to the beneficiaries (including Eugene E. Mori) of said Estate as their interests may be determined;

4. That the amounts surcharged and assessed against Eugene E. Mori, as set forth in Paragraphs 1 and 2 above,

shall be recovered by the Executor of the Estate of Olive E. Mori, Deceased, as follows:

(i) First, from any balance due Eugene E. Mori from the Estate of Olive E. Mori, Deceased, and from the accumulation of interest and other income thereon which has, by reason of a prior Order of this Court barring distribution, not been distributed to Eugene E. Mori;

(ii) Second, from any balance due Eugene E. Mori from the Estate of Eugene Mori, Deceased, and/or from the Trust under the Will of said Eugene Mori, Deceased, and from the accumulation of interest or other income thereon which has, by reason of a previous order of this Court barring distribution, not been distributed to Eugene Mori; and

(iii) Third, from any interest or other income from the aforesaid Trust accruing from and after the recovery pursuant to (ii) above which, but for this Judgment, would be payable to Eugene E. Mori.

5. That the surcharge for legal and accounting fees incurred in connection with the Estate of Olive E. Mori, Deceased, shall be paid as follows:

(i) To the firm of Cooper Perskie April Niedelman Wagenheim & Weiss, P.A., legal fees in the amount of $237,141.00, together with costs in the amount of $794.00, for a total of $237,935.00; provided that an additional sum of $4,375.00 shall be paid by the Estate of Olive E. Mori, Deceased, to such law firm, which additional sum is not included within the sum surcharged against Eugene E. Mori;

(ii) To the firm of McCarter & English, the sum of $215,578.00, together with costs in the amount of $14,753.00, for a total of $230,331.00;

(iii) To the firm of Horn Kaplan Goldberg Gorny & Daniels, the sum of $4,200.00, together with costs in the amount of $82.00, for a total of $4,282.00;

(iv) To David H. Dugan, III, Esquire, the sum of $8,500.00 with no sum payable for costs; and

(v) To the accounting firm of Capaldi, Schalick & Reynolds, accountant fees in the amount of $2,450.00, with no sum payable for costs;

6. The previous Orders of this Court barring distribution or payment of the sums described in Paragraph 4 (i), (ii) and (iii) above shall be and hereby are vacated.

7. To the extent that the amounts set forth in Paragraphs 1 and 2 above remain unpaid after the sums described in Paragraph 4 (i) and (ii) are recovered and paid as hereinabove, the Executor of the Estate of Olive E. Mori, Deceased may undertake and pursue such other collection efforts as are provided by law and permitted by the Courts.

8. The amounts to be paid pursuant to Paragraph 5 above shall be paid forthwith by the Executor of the Estate of Olive E. Mori, Deceased as and when monies are recovered from the sources described in Paragraph 4 (i) and (ii) above and thereafter from any other source or sources as may properly be the subject of levy and execution by said Executor, and the amounts so paid and the purposes for which they are paid shall be deemed as though presented and allowed upon said Executor's third account;

9. That pursuant to *R.* 4:99-4, the Surrogate of Burlington County shall forthwith transmit the original of this Judgment to the Clerk of the Superior Court for entry in the Civil Judgment and Order Docket, that this Judgment shall have the full force, operation and effect of a Judgment of the Superior Court, Law Division, and that execution may issue thereon in this and all other jurisdictions as is provided by applicable law.

10. The Counterclaims of Joan M. McCrane, Individually, the Trustees, and the Children of Joan McCrane, filed against Bernard W. Capaldi, the Executor of the Estate of Olive E. Mori, Deceased, be and the same hereby are dismissed with prejudice and without costs.

HAROLD B. WELLS, III,
J.S.C.

APPENDIX D

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5344-86-T8

IN THE MATTER OF THE ESTATE

OF

OLIVE E. MORI, DECEASED[1]

ORIGINAL FILED
Oct 3, 1989

Emille R. Cox, Esq.
Acting Clerk

Argued: February 8, 1989—Decided: October 3, 1989

Before Judges King, Brody and Ashbey.

ON APPEAL FROM THE SUPERIOR COURT, LAW DIVISION, PROBATE PART, BURLINGTON COUNTY.

RICHARD D. CATENACCI argued the cause for appellant-cross-respondent (CONNELL, FOLEY & GEISER, attorneys; MR. CATENACCI and ADRIAN M. FOLEY, of counsel; MR. CATENACCI, BRIAN T. MURNANE and ERNEST W. SCHOELLKOPFF, on the brief).

JULIUS B. POPPINGA argued the cause for respondents cross-appellants, JOAN M. MCCRANE, A. ARTHUR MILLER and JULIUS B. POPPINGA (MCCARTER & ENGLISH, attorneys; MR. POPPINGA, of counsel; JOHN R. DROSDICK, on the brief).

JAMES L. COOPER argued the cause for respondent BERNARD W. CAPALDI (COOPER, PERSKIE, APRIL, NIELDMAN & WAGENHEIM, attorneys; KENNETH D. WOLFE and GERARD W. QUINN, on the brief).

DAVID H. DUGAN argued the cause for respondents-cross appellants children of JOAN MCCRANE (MR. DUGAN, on the brief).

[1] We use this caption, although the November 21, 1986, judge's written opinion noted that the three estates (Gene's incompetency estate, Gene's probate estate, and Olive's probate estate) were consolidated for purposes of trial respecting the "several issues involving Swiss assets."

PER CURIAM

This is an appeal by Eugene Mori (Eugene), a former executor of his mother's estate who was surcharged counsel fees and punitive damages for violating his fiduciary duties, particularly concealing the existence of assets in Switzerland which the court found should have been included in the estate. We affirm.[2]

A chronological family and procedural history is necessary. The Mori parents, Eugene Sr. (Gene) and Olive had three children. Eugene was unmarried. He had two sisters, Janice Vondra and Joan McCrane. Sometime in 1958 Gene, with Eugene's help, started transferring money out of the United States into a secret bank account called "Manofwar" at the Swiss Credit Bank in Zurich, Switzerland. The existence of these assets was not disclosed to federal or state taxing authorities. Gene continued to deposit money in the Manofwar account until 1973, at which time the account held approximately $1.6 million dollars. Gene gave Eugene and Olive "power of attorney" over "Manofwar." Eugene also maintained his own Swiss account.

In February 1974 Gene suffered a stroke. He was declared incompetent, and Eugene and Olive became co-guardians of Gene's estate. In August 1974, Olive and Eugene traveled to Switzerland and transferred the assets out of the Manofwar account into a new account entitled "Mrs. E. Glorida," at the Swiss Credit Bank. Eugene had power of attorney over the account.

On July 16, 1975, Olive died and Bernard Capaldi (an accountant and long term friend of Gene's) and Eugene became co-executors of her estate. Approximately one month after Olive's death, Eugene went to Switzerland and transferred the Swiss assets out of the "Mrs. E. Glorida" account at Swiss Credit into a new account at the Union Bank of Switzerland entitled "Maraflora Foundation." Eugene had sole control over this account. Joan McCrane, Eugene's sister, who had known about Gene's Swiss transfers, testified

[2] Eugene's motion to include as respondents Julius Poppinga, Janice Vondra and the children of Joan McCrane is granted.

that when she then asked Eugene about Gene's Swiss bank accounts, Eugene said, " 'its been cleared up.' "

Gene died on October 8, 1975. The Bank of New Jersey (later the Princeton Bank) was appointed administrator of Gene's estate. Vincent Gentile, a senior trust officer for the bank, tried to trace the Swiss assets from McCrane's evidence. Eugene did not respond to Gentile's request for bank records. Gentile testified that from February 1976 to June 10, 1976, Eugene denied the existence of any Swiss assets. Eugene also denied knowledge of any Swiss assets in a deposition conducted by attorneys for the bank in February 1976, a denial which Eugene later admitted was perjury.

On behalf of Olive's estate Capaldi pursued his own investigation. The Union Bank of Switzerland informed Capaldi that it would not release any information unless Eugene as co-executor also signed Capaldi's letter of inquiry. Capaldi testified that he asked Eugene many times "whether he had any Swiss accounts" and Eugene denied their existence. Capaldi testified that Eugene refused to sign Capaldi's letters of inquiry because Eugene said, "there was nothing there." [3] Gentile also testified that Eugene refused to execute any documents that would authorize the Swiss banks to provide the requested information to him for Gene's estate.

Matters came to a head when, on February 7, 1977, Eugene appeared in court, refused to answer questions concerning the Swiss assets and invoked his privilege against self-incrimination under the Fifth Amendment. On February 8, 1977, Eugene was ordered to cease and desist from interfering with the Bank of New Jersey's investigation. The order required Eugene to execute a "Consent, Release, Waiver and Covenant" to expedite release to the Bank of New Jersey "all information and documents requested . . . ."

On May 13, 1977, Swiss Credit responded to Capaldi's inquiries. That bank confirmed that Olive Mori had three accounts under the pseudonym "Mrs. E. Glorida" and that

[3] Later Eugene asserted that he refused because the letter sought information about Eugene's personal accounts in addition to information pertaining to Olive and Gene.

Eugene had removed the assets from those accounts based upon Olive's power of attorney. A few days before Capaldi received this letter, Eugene met with Capaldi and confirmed the existence of the Swiss accounts. Apparently just shortly before, Eugene had returned to Switzerland and arranged to have the assets at the Union Bank redeposited at Swiss Credit in an account entitled "Estate of Olive Mori." Eugene resigned as executor of Olive's estate effective August 2, 1977.[4]

Contempt proceedings against Eugene respecting prior court orders were tried in September 1977. The trial was recessed when Eugene agreed to sign releases for his parents' accounts at both Swiss Credit and the Union Bank. Eugene purported to account to Capaldi, but Capaldi testified that Eugene's "List of Income, Taxes and Fees from August 1975 to May 1977" did not assist Capaldi with income tax information because it was not compiled by year.

On September 15, 1978 and November 13, 1978, the Bank of New Jersey obtained orders to compel Eugene to testify about the Swiss assets. In Olive's estate a November 28, 1978 court order compelled Eugene to appear and to testify. Eugene never appeared.[5] A final date for appearance, December 18, 1978, was set by the court.

In the midst of this confusion, a massive tax problem faced the two estates resulting in a December 1978 settlement agreement between them. The agreement provided that the Swiss money would be included in Olive's estate, which was prudent since her combined federal and state death tax rate was considerably less than the combined tax rate of Gene's estate. A related "family settlement agreement" provided for the creation of a trust by Janice Vondra to compensate the heirs under Gene's will, who did not inherit in the same proportions as the heirs under Olive's will. Particularly affected were the children of Joan McCrane.[6]

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[4] This removal was instigated by his sister Joan.

[5] Later Eugene asserted that he was never informed of the proper date.

[6] We derived this information from other documents. Gene's ultimately probated will is not included in the record on appeal.

Following Eugene's failure to appear on December 18, 1978, a bench warrant was issued and on January 4, 1979, Eugene did appear and invoked the Fifth Amendment (on advice of counsel then present) respecting the Swiss assets. The court stayed any distributions from Olive's estate to Eugene, and denied Eugene's motions to vacate the court's September 15, 1978 and November 13, 1978 orders.

On January 17, 1979, Capaldi filed a chancery complaint as executor of Olive's estate, seeking to surcharge Eugene for costs and fees regarding the investigation of the Swiss assets, and seeking punitive damages. While these proceedings were pending, Eugene filed for bankruptcy. On April 15, 1980, the bankruptcy judge remanded the claims to the probate judge, including the claims in Capaldi's chancery suit.

On April 29, 1980, Capaldi filed his first accounting as executor of Olive's estate. This accounting was approved on August 5, 1980. The judge ruled that the Swiss assets "belong to and are the property of [Olive's] estate free and clear of any claim of any type, nature or description whatsoever on the part of Eugene E. Mori." We affirmed this ruling on appeal, and on June 26, 1981, Capaldi's chancery suit was dismissed without prejudice and with his consent.

Eugene finally gave Capaldi a letter from the Union Bank dated April 9, 1980, confirming that all assets received from Swiss Credit Bank in August 1975, had been transferred back in May 1977. On April 29, 1982, Capaldi and Eugene entered into a Consent Order requiring Eugene to account, as co-executor of Olive's estate, for the period ending August 2, 1977. Eugene filed his "certification and account of Eugene E. Mori" seeking approval of his account as co-executor of his mother's estate. Joan McCrane, Arthur Miller and Julius Poppinga[7] excepted from the account.

When Capaldi filed his second accounting on June 9, 1982, he revived the earlier chancery surcharge claims against Eugene seeking $291,044.16. On August 26, 1982, Capaldi

[7] Joan McCrane acted individually. She and Miller were, under Olive's will and the agreement, also trustees. Poppinga was a trustee for the trust created for Joan McCrane under Olive's will.

submitted to the court an "Accounting for Transfer of Assets from Swiss Credit Bank to Union Bank and Return." The probate judge approved the second accounting, retaining jurisdiction over the surcharge claims.

On August 21, 1984, Capaldi filed a complaint in probate for instructions seeking to have the probate judge resolve the outstanding issues of credits and surcharges. On January 9, 1985, McCrane, Miller and Poppinga filed a surcharge claim that Capaldi had not diligently prosecuted the estate claims against Eugene and in January 1985 Capaldi amended his complaint to include a claim of punitive damages.[8]

Trial commenced on January 28, 1986, lasting until March 31, 1986. Post trial hearings followed. The trial judge issued three decisions, November 31, 1986, April 24, 1987 and May 18, 1987, in which he found that Eugene breached his duty as a fiduciary and surcharged Eugene compensatory damages of $749,168 (costs, counsel and accountants' fees), plus pre-judgment interest in the amount of $244,570 for a total of $933,738. The court also assessed $1,610,000 in punitive damages against Eugene.

I

On appeal Eugene asserts that the court's award of punitive damages improperly resulted from Eugene's assertion of his Fifth Amendment rights, invoked on the advice of counsel. We reject this claim, as did the trial court. The standards for punitive damages are outlined in *Nappe v. Anschelewitz, Barr, Ansell & Bonello,* 97 *N.J.* 37 (1984).

> To warrant a punitive award, the defendant's conduct must have been wantonly reckless or malicious. There must be an intention wrongdoing in the sense of an "evil-minded act" or an act accompanied by a wanton and willful disregard of the rights of another. [*Id.* at 49].

[8] Simultaneously with these probate proceedings, Eugene's accounting, as co-guardian for the estate of Gene as an incompetent, was tried, resulting in a forfeiture of commissions and a surcharge. We do not detail the history of the related litigation which was a separate subject of appeal.

There must be a " 'positive element of conscious wrongdoing,' " *ibid,* quoting *Berg v. Reaction Motors Div.,* 37 *N.J.* 396, 414 (1962), or a deliberate act or omission with knowledge of a high degree of probability of harm. *Ibid.*

While the advice of counsel may be a factor "negating malicious intent," *Sandler v. Lawn-A-Mat Chem. & Equip. Corp.,* 141 *N.J. Super.* 437, 452 (App. Div. 1976), certif. den. 71 *N.J.* 503 (1976); *see also* 25 *C.J.S., Damages,* § 123(7) at 1146, the trial court's findings related to Eugene's actions before he asserted his Fifth Amendment rights.[9] That conduct was unrelated to counsel's advice and warranted the judge's legal conclusions.

In any event, Eugene had no Fifth Amendment privilege to withhold the disclosure of information he was required by law to keep. *Shapiro v. U.S.,* 335 *U.S.*1, 68 *S.Ct.* 1375, 92 *L.Ed.* 1787 (1948). *Evid. R.* 25(c) codifies that rule. Moreover, as an executor Eugene was required to settle and to distribute the estate according to Olive's will. *N.J.S.A.* 3B:10-23. He was required to disclose material facts affecting the estate. *See Cohen v. First Camden National Bank & Trust Co.,* 51 *N.J.* 11, 20 (1967). He was under a duty to disclose to federal and state taxing authorities the amount of Olive's estate and the income it was receiving. *See United States v. Hankins,* 424 *F.Supp.* 606, 614 (N.D.Miss. 1976), aff'd 565 F.2d 1344 (5th Cir. 1970). Moreover, the Fifth Amendment did not protect him from the consequences of testifying falsely. *State v. Daniels,* 165 *N.J.Super.* 47, 51 (App. Div. 1979), certif. den. 81 *N.J.* 349 (1979); *see also Kline v. Harris,* 667 *F.*2d 274, 287-288 (2d Cir. 1981).

Eugene next asserts that the award of punitive damages (and compensatory damages) having been based on his assertion of his Fifth Amendment rights, was too "costly" and violated the constitution, relying on *Spevack v. Klein,* 385 *U.S.* 511, 515, 87 *S.Ct.* 625, 17 *L.Ed.*2d 574, 577 (1967) and *Griffin v. California,* 380 *U.S.* 609, 85 *S.Ct.* 1229, 14 *L.Ed.*2d 106 (1965). His reliance is misplaced. Sanctions in civil

[9] Eugene became an executor of his mother's estate on July 30, 1975. He began asserting his Fifth Amendment rights sometime in early 1977.

cases may be imposed despite a Fifth Amendment assertion. *Duratron Corp. v. Republic Stuyvesant Corp,* 95 *N.J. Super.* 527, 531 (App. Div. 1967), certif. den. 50 *N.J.* 404 (1967); *Whippany Paper Board Co. v. Alfano,* 176 *N.J. Super.* 363, 376 (App. Div. 1980); *see also Mahne v. Mahne,* 66 *N.J.* 53, 56-61 (1974).

Eugene's primary factual claim is that the evidence did not support the court's finding that his intent was wrongful in the light of his own legitimate claim to the Swiss assets. We do not find this argument persuasive. Eugene knew of his duties as a fiduciary, including disclosing his own interest to the heirs. As the court found, he intentionally failed to execute his duties and tried to keep the estate's assets for himself. Even if he had a bona fide claim to the assets, this conduct was still a "conscious wrongdoing," an "intentional wrongdoing." *Nappe v. Anschelewitz,* 97 *N.J.* at 49; *LaBruno v. Lawrence,* 64 *N.J. Super.* 570, 575 (App. Div. 1960), certif. den. 34 *N.J.* 323 (1961).

The award of punitive damages against a fiduciary for intentionally failing to execute his duties or attempting to convert the assets under his care for his own use is well established in New Jersey. *See Albright v. Burns,* 206 *N.J. Super.* 625, 635-636 (App. Div. 1986). Other jurisdictions agree. *See Texas Bank & Trust Co. v. Moore,* 595 *S.W.*2d 502, 510 (Tex. Sup. Ct. 1980); *Estate of Gould,* 558 *S.W.*2d 755 (Mo. Ct. App. 1977), *cert.* den. 436 *U.S.* 905 (1978); *Cartee v. Lesley,* 290 *S.C.* 333, 350 *S.E.*2d 388 (Sup. Ct. 1986); *Rivero v. Thomas,* 86 *Cal. App.*2d 225, 194 *P.*2d 533 (Cal. Ct. App. 1948); *Werschull v. United California Bank,* 149 *Cal. Rptr.* 829, 85 *Cal. App.* 3d 981 (Ct. App. 1978); *Adams v. Harris,* 564 *S.W.*2d 152 (Tex. App. Ct. 1978); Smith, "Remedies in Surcharge Litigation," 16 *Real Prop. Prob. & Tr. J.* 775, 783 (1981); *Bogert, Trusts and Trustees,* §862 at 40 (2d ed. 1982).

Eugene next urges that the estate of Olive Mori was not harmed by his conduct so that the punitive damage award was unwarranted. While the extent of the actual harm inflicted is a factor the trial court should consider when

making a punitive damage award and a punitive award should bear a reasonable relation to the injury inflicted and cause of the injury, *Leimgruber v. Claridge Associates,* 73 *N.J.* 450, 457 (1977); *Endress v. Brookdale Community College,* 144 *N.J. Super.* 109, 146 (App. Div. 1976), Eugene's claim that the trial court did not fully take into account the extent of the harm inflicted is clearly meritless. In *Nappe v. Anschelewitz,* a two dollar nominal damage award and a $50,000 punitive damage award were upheld. The Court stated,

> The punitive award is not required to have a fixed proportional relationship to the amount of compensatory damages.
>
> * * *
>
> Our courts have held that punitive damages could be awarded for egregious conduct in the absence of compensatory damages. [97 *N.J. at 50* (citing numerous authorities)]

See also Fisher v. Johns-Mansville Corp., 103 *N.J.* 643, 673 (1986); *Winkler v. Hartford Accident and Indem. Co.,* 66 *N.J. Super.* 22, 29 (App. Div. 1961), certif. den. 34 *N.J. 581* (1961).

Eugene also contends that $1.6 million in punitive damages, as a *de facto* forfeiture of Eugene's entire inheritance, was against his parents' intention and against the court's finding.[10] We first note that his assertion of being entirely deprived of his inheritance is unsupported. In any event, one of the goals of punitive damages is to punish the wrongdoer.[11] *Fisher v. Johns-Mansville Corp.,* 103 *N.J.* at 657.

Eugene next asserts that the punitive damage award violated the Excessive Fines clause of the United States

[10] The trial judge said that he did not intend to "effect a complete forfeiture of Eugene's inheritance."

[11] While evidence of Eugene's worth is sparse, in his bankruptcy litigation in 1979, Eugene's personal assets were listed as $24 million dollars with six and one-half million dollars (approximately) in liabilities. At March 26, 1980 depositions he testified that the approximately $100,000—$150,000 he kept as assets abroad were a "teeny fraction . . . maybe one percent" of what he was worth.

Constitution, *U.S. Const.*, Amend. VIII, and New Jersey Constitution, *N.J. Const.* (1947), Art. I, par. 12. The United States Supreme Court, however, has recently ruled otherwise. In *Kelco,* six million dollars in punitive damages were awarded against a waste collection company when the actual damages were around $100,000. The circuit court upheld the award. *Kelco Disposal v. Browning-Ferris Industries,* 845 *F.*2d 404 (2nd Cir. 1988). The Supreme Court held that the Eighth Amendment's Excessive Fines clause did not apply to awards of punitive damages in cases between private parties. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* *U.S.* , 109 *S.Ct.* 2909, *L.Ed.*2d (1989).

II

Eugene also challenges two evidence rulings. He urges that the court improperly excluded evidence concerning his and his parents' conspiracy to evade income taxes on the secret Swiss account. It was his contention that evidence of the conspiracy supported his claim that his parents intended (or that he was reasonable in believing that they intended) that he alone owned the account after their deaths.[12] On motion the court ruled that Eugene's conspiracy to evade taxes and his breach of his fiduciary duty to marshall all asserts were unlawful purposes, evidence of which was inadmissible in support of the wrongdoer's claims, citing *Fitzgerald v. Newark Morning Ledger Co.,* 111 *N.J. Super.* 104 (Law Div. 1970), *Naimo v. La Fianza,* 146 *N.J. Super.* 362 (Ch. Div. 1976), and other cases. Although these cases reject the enforcement of illegal contracts, *see Vasquez v. Glassboro Service Ass'n, Inc.,* 83 *N.J.* 86, 98-99 (1980), they also hold that the courts will not recognize or allow a party to receive a benefit from evidence of an illegal act or contract. We agree.

[12] The court's earlier factual finding and legal conclusion that Eugene did not own any of these assets was affirmed in Eugene's 1981 appeal, *see* A-261-80-T3.

Eugene asserts that the trial court erred when it admitted into evidence Warren Lewis' letter, consisting of legal opinions as to Eugene's fiduciary duty. He also asserts that in allowing the admission of Mr. Lewis' testimony, the trial court abdicated its obligation to determine the law, relying on *Sesselman v. Muhlenberg Hospital*, 124 *N.J. Super.* 285, 289-290 (App. Div. 1973), where the court stated that a medical expert testifying in a malpractice case is limited to stating his understanding as to what comprises the standard in the profession, not a statement as to the legal basis of a physician's responsibility.

We are satisfied that the trial court properly admitted the testimony and report of Lewis. Eugene extensively cross-examined Lewis. There is no support for Eugene's contention that the judge's opinion reflected a blind or unreasoned reliance on Mr. Lewis' opinion.[13] *See Johnson v. Johnson*, 212 *N.J. Super.* 368, 390-391 (Ch. Div. 1985) (fiduciary duty); *see also Overlook Terrace Corp. v. Excel Properties Corp.*, 210 *N.J. Super.* 420 (App. Div. 1986) (accountant's duty).

III

Eugene next asserts that the trial court's surcharge award was error. The authority to surcharge an executor or to make an award out of the Olive Mori estate as a fund in court is not at issue. *See In re Koreteky*, 8 *N.J.* 506, 531 (1951). Moreover, although counsel fees are not ordinarily included as damages, one forced to incur counsel fees as the result of another's fraud or wrongdoing may recover from the tort-feasor such counsel fees as damages flowing from the tort. *Dorofee v. Pennsauken Tp. Planning Bd.*, 187 *N.J. Super.* 141, 144 (App. Div. 1982). Although no New Jersey case has addressed attorney's fees in this context, the court in *Dorofee* said,

> The award of counsel fees as traditional damages in such settings is not precluded by *R.* 4:42-9. See *Cohen v. Fair*

[13] The court rejected Lewis' opinion that Capaldi had breached his fiduciary duty.

Lawn Dairies, Inc., 86 *N.J. Super.* 206 (App. Div. 1965), aff'd 44 *N.J.* 450 (1965); *Pressler, Current N.J. Court Rules,* Comment *R.* 4:42-9. [*Ibid.*]

Accord Enright v. Lubow, 202 *N.J. Super.* 58, 85 (App. Div. 1985), certif. den. 104 *N.J.* 376 (1985). The applicable principles have been stated in *Estate of Rothko,* 84 *Misc. 2d* 830, 379 *N.Y.S. 2d* 923 (Sur. Ct. 1975), aff'd 56 *A.D.* 2d. 499, 392 *N.Y.S.* 2d 870 (App. Div. 1977), aff'd 43 *N.Y.* 2d 305, 372 *N.E.* 2d 291, 401 *N.Y.S.* 2d 449 (Ct. App. 1977), a leading case on executor's breach of fiduciary duty. There the trial court found the executors guilty of a self-serving breach of loyalty. The executors were removed, denied commissions and the legal expenses of the objectors were charged to them. *See also Estate of Martin,* 39 *Wis.* 2d 437, 445, 159 *N.W.* 2d 660, 663-664 (Sup. Ct. 1967); 16 *Real Prop. Prob. & Tr. J.* at 779. That authority is persuasive. The trial court's action in holding Eugene liable for all of the counsel fees necessitated by his breach of fiduciary duty was not an abuse of discretion.

Eugene also challenges the court's allocations of counsel fees as not supported by the evidence. The trial court analyzed each law firm's involvement in Olive's estate and ruled on the reasonableness of the fees incurred and which fees were attributable to Eugene's misconduct.

There were many lawyers. It is a fair reading of the record that Eugene's actions made both their number and their work necessary. The trial court carefully discriminated among the counsel fees from the first accounting, the appeal from the first accounting, the second accounting and the final application. Our careful review of the record persuades us that there was substantial evidence (the majority of which was unrefuted by Eugene) to uphold the court's allocation of the vast majority of the estate's counsel fees to Eugene. *Rova Farms Resort v. Investors Ins. Co.,* 65 *N.J.* 474, 484 (1979).

Related to this argument, Eugene asserts that "Capaldi testified that he had sufficient information in August 1977 to determine the total value of the Swiss assets." He asserts that his attorneys provided Capaldi with sufficient information covering the Maraflora-A account in late 1977 and again in

April, 1980. Therefore, all later work was unnecessary. Based on Eugene's conduct during this period, on the Swiss banks' reluctance to supply the required information, and the complexity of the estate created by the concealment, we conclude that the court's award of attorney fees through the date of trial was reasonable and supported by the evidence.

Eugene also asserts that he was entitled to a "setoff" because the assets under his care incurred a net gain "which clearly covered any and all tax penalties and interest and gives the estate a double benefit. . . ."[14] The trial court said,

> There is no question that the estate gained mathematically from the delay in paying taxes on the Swiss assets. Swollen by unpaid taxes, they earned about 10% per annum in the three years they went unpaid and when they were paid the interest was only 7% per annum.

The court recognized that in some situations a deliberate decision made in good faith to delay payment of taxes might be held prudent and reasonable where the estate benefits from the interest rate differential. In this case, however, although penalties were ultimately minimized, an enormous risk to the estates was taken by Eugene who did not act in good faith. His decision not to disclose the assets was not made to maximize the estate. He did not consult the beneficiaries, and he did not set aside a reserve to pay the tax liability. *See Pennsylvania Co. v. Gillmore,* 142 *N.J.Eq.* 27, 47 (Ch. 1948).

Eugene also specifically challenges the counsel fee award to McCarter & English as counsel for Joan McCrane individually and the trustees under Olive's will because Julius Poppinga of that firm also served as trustee, resulting in his being paid for work he was obligated to do, and which others were doing. We are satisfied that, once Eugene embarked upon a deception designed to deprive the others of their inheritance, the extent to which he caused extra expense necessary to protect the estates and the heirs became difficult to measure. As we noted, the trial court went to great pains to separate the fees attributable to Eugene's defalcations and those attributable to the normal estate requirements. We find no error.

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[14] Eugene's argument on this issue is brief and unsupported.

We reject also Eugene's assertion that Poppinga was compensated for the services of others which he should have performed. While fiduciaries should perform all routine duties not calling for professional expertise, matters that require professional legal skills and knowledge will support a further claim for counsel fees. *See N.J.S.A.* 3B:18-6. The record clearly supports the judge's conclusion that there was nothing routine about the work Eugene caused.

IV

The final judgment awarded prejudgment interest in the amount of $244,570 which Eugene urges was error. Eugene asserts that the court should not have awarded prejudgment interest since the estate's costs and counsel fees, on which the prejudgment interest was awarded, had been listed as expenses for tax deduction purposes on the estate's income tax returns. Since the estate was thus not deprived of interest on this money, further receipt of prejudgment interest amounted to a windfall.[15] Interest can be awarded on that part of a compensation award that is attorneys' fees. *Cohrs v. Igoe Bros., Inc.*, 66 *N. J. Super.* 526, 529 (Law Div. 1961) (post-judgment interest), rev'd 71 *N. J. Super.* 435, 450 (App. Div. 1962) (specific facts of case did not warrant award of post-judgment interest). Prejudgment interest is compensatory, not punitive. *Busik v. Levine*, 63 *N. J.* 351, 358 (1973), app. dismissed 414 *U.S.* 1106 (1973). We find little relevance between the taxing of the estate and pre-judgment interest. *Cf. USM Corp. v. Marson Fastener Corp.*, 392 *Mass.* 334, 467 *N.E.*2d 1271 (Sup. Ct. 1984). There was no error.

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[15] Eugene also argues that this in an "exceptional case," *R.* 4:42-11(b), since it was actually the respondents who caused the problems, and, for that reason, no prejudgment interest should be awarded. This assertion is meritless.

Eugene's remaining points on appeal are clearly without merit. *R.* 2:11-3(e)(1)(E). [16]

We affirm the May 19, 1987 judgment substantially for the reasons expressed in Judge Well's opinions of November 21, 1986, April 24, 1987 and May 18, 1987.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Acting Clerk

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[16] Respondents' cross-appeal, "only in the event that this court should decide that, in concept, the punitive award was inappropriate or should otherwise be set aside or substantially reduced," is moot.

APPENDIX E

SUPREME COURT OF NEW JERSEY
C-454 September Term 1989
31,085

IN THE MATTER OF THE ESTATE

OF

(EUGENE MORI, PETITIONER)

ON PETITION
FOR
CERTIFICATION
FILED
Jan. 12, 1990

Stephen Townsend
Clerk

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-5344-86T8 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 10th day of January, 1990.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE SUPREME COURT
OF NEW JERSEY

CLERK OF THE SUPREME COURT

APPENDIX F

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